SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 289.

HUBERT WORK, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

STATE OF LOUISIANA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Supreme Court of the District of Columbia.

STATE OF LOUISIANA, PLAINTIFF, *vs.* ALBERT B. FALL, SECRETARY OF THE INTERIOR, defendant.	In Equity, No. 39570.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill of complaint.

Filed November 10, 1921.

[Title omitted.]

To the Supreme Court of the District of Columbia, holding an equity court:

The State of Louisiana, plaintiff, by its attorney general, A. V. Coco, brings this, its bill of complaint, on its own behalf, against Albert B. Fall, a citizen of the State of New Mexico, residing in the District of Columbia, in respect to the matters and things hereinafter set forth.

I.

That at the several times hereinafter referred to the defendant, Albert B. Fall, was, and still is, Secretary of the Department of the Interior, and as such has charge of the administration of the laws of the United States relating to the public lands and the administration of all land grants made by Congress, including any portion of the public lands; that he is sued in his official capacity as such Secretary of the Interior, as hereinafter set forth.

II.

That, by the act of March 2, 1849 (9 Stat. 352), there was granted to the State of Louisiana the whole of those swamp and overflowed lands which may be or are found unfit for cultivation to aid the State in constructing the necessary levees and drains to reclaim the swamp and overflowed lands within said State, and by the second
2 section of said act it was made the duty of the Secretary of the Treasury (afterwards the Secretary of the Interior) to make out a list of swamp lands within said State, and the fee simple title to said lands vested in the State of Louisiana on the approval of said list.

III.

That by the act of Congress approved September 28, 1850 (9 Stat. 519), a general grant of swamp lands within the limits of the several States was made, which also included the State of Louisiana.

IV.

That the history of procedure by the Land Department in the adjustment of these grants to the State of Louisiana is reviewed, and specific instructions given for a speedy and final adjustment of said grants, in the departmental order of October 1, 1903 (32 L. D. 271), which is made a part of this bill as though specifically set forth herein.

V.

That the specific lands involved in this suit are in township 18 N., R. 14 W., in the State of Louisiana, and are by the public land plat of survey of 1838 shown to be included in Cross Bayou and Cross & Soda Lakes, but are disclosed and in the usual manner identified by the later plat of survey of said township made in 1871 and therein returned as swamp and overflowed lands.

VI.

That on consideration of the claim of the State of Louisiana to the lands the subject of this bill, the Commissioner of the General Land Office, in his decision of November 13, 1919, addressed to the register and receiver at Baton Rouge, Louisiana, specifically found from the field notes of the survey of 1871 that these lands are swamp or overflowed and, if nonmineral in character, inure to the State under its grant and may be patented pursuant thereto; but because of the fact that these lands were on July 2, 1910, within a petroleum reserve, it was required of the State that it assume the burden of proving that they do not possess value for oil or gas deposits under penalty of cancellation or forfeiture of the State's claim for failure to apply for a hearing to that end. A copy of this decision is attached hereto, marked "Plaintiff's Exhibit A," and is made a part of this bill.

VII.

That from said decision of the Commissioner of the General Land Office the State duly appealed to the Secretary of the Interior, and under date of July 18, 1921, that officer affirmed the action of the Commissioner of the General Land Office as taken in his said decision of November 13, 1919.

3 VIII.

That thereupon a motion for exercise of supervisory authority was filed on behalf of the State of Louisiana, which motion was denied

by the Secretary of the Interior under date of September 16, 1921, wherein he held:

"(1) Mineral lands not being expressly included within the terms of the swamp grant either of 1849 or 1850, do not inure to the State. (2) The interest of the State is inchoate and incomplete until title is vested and the fee simple title only passes upon approval under the act of 1849 and by patent pursuant to the act of 1850. (3) The authority of the Land Department to inquire into and determine all rights and equities claimed as against the Government does not cease until the legal title has passed. (4) A complete and perfected interest corresponding to full equitable title does not accrue to or vest in the State as to any tract of land until the same has been finally identified as of the class and condition contemplated by the granting act. (5) The question as to the mineral or non-mineral character of claimed swamp land is open for investigation and adjudication up to and until the time of patent under the act of 1850 and up to the date of the Secretary's approval under the act of 1849.

"Nothing presented by counsel persuades the department that the holding on appeal in this case is in error. Upon the records of the land department the tracts are impressed with a prima facie mineral character by reason of the subsisting petroleum withdrawal. The State has been accorded due opportunity to show that such is not the character of the lands and that they are, in fact, not mineral bearing, failing in which, it was held, the swamp-land claim must stand rejected.

"The conclusions reached, in the decision rendered upon appeal herein, are adhered to and the present motion is denied."

IX.

That the State of Louisiana is advised, and therefore alleges, that the said act of March 2d, 1849, was a present grant to the State of Louisiana of all swamp and overflowed lands within the limits of that State; that the said act of September 28th, 1850, was likewise a present grant of all swamp and overflowed lands; that the character of the lands conveyed in said acts was the whole of the swamp and overflowed lands within the limits of the State, and neither by the terms of the said act nor otherwise were any swamp or overflowed lands excepted or reserved out of the said grant by reason of their mineral character.

That if the Secretary of the Interior had been correct in his conclusion of law that mineral lands were excepted from the swamp-land grant, then that the further conclusion would have been necessary that said lands must have been known to possess such mineral character at the date the grant was made, or, at least, at the time of the filing and approval of the plat of survey of the township, by which survey the lands were identified as of the character granted to the State.

4 That in ignoring the rights of the State to the lands found by him as a matter of fact to be swamp and overflowed lands and to have been identified as such by the said survey of 1871, the said defendant is exceeding his authority, power, and jurisdiction in the making of the unusual and unlawful requirement of imposing upon the State the burden of showing that the lands have, as a present fact, no mineral value, and, particularly, in denying the right of the State to said lands because it has not undertaken to discharge the burden thus illegally put upon it.

X.

That, neither in 1849, nor in 1850, the date of the granting acts above referred to, nor in 1871, in which year the said lands were officially surveyed and returned by the surveyor general as swamp and overflowed lands, were any minerals of any character known to exist in the said lands or within any part of the territorial limits of said petroleum reserve of July 2d, 1910.

XI.

That plaintiff says that it has completely exhausted its rights of appeal and petition before the Department of the Interior, and that its only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid, and which rulings, as plaintiff is advised by counsel, and accordingly so avers, are erroneous in matter of law.

XII.

And plaintiff further states that the defendant will, unless restrained by the order of this court, carry his order for the cancellation or rejection of plaintiff's claim to these lands into effect and thereupon make disposition of said lands to others, thereby making a multiplicity of suits necessary, all to the irreparable loss, damage, and injury of your plaintiff, and for which plaintiff has no adequate remedy at law and is otherwise remediless except in equity.

Wherefore, the premises considered, the plaintiff prays:

(1) That the process of this court issue, directed to the defendant, Albert B. Fall, Secretary of the Interior, requiring him to appear and make answer unto the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

(2) That upon the filing of this bill, or upon such short day thereafter as shall be fixed by the court, a preliminary order may be issued herein, restraining and enjoining pendente lite the defendant, his successors in office, and each, every and all persons claiming under his authority or control, from taking further action in enforcement of the ruling herein complained of.

(3) That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may

issue against said defendant, commanding and requiring that the certain ruling or decision herein complained of be vacated and set aside, and that the right granted to the plaintiff under the acts aforesaid be recognized, respected, and given full legal force and effect, as by the said acts provided.

(4) And that plaintiff may have all such other and further relief as the nature of its case may demand and require and as may be agreeable to equity.

A. V. Coco,
Atty. Genl. for the State of La.

F. W. Clements,
Thigben, Herold & Lee,
Of Counsel.

November 10, 1921. Service this day accepted.

Edwin A. Booth,
C. E. Wright,
Atty. for Deft.

Plaintiff's Exhibit "A," to complaint.

In reply please refer to
655506 "G" RWP.

Department of the Interior,
General Land Office,
Washington, November 13, 1919.

Address only the Commissioner of the General Land Office.

Swamp-land claims in T. 18 N., R. 14 W.

Register and Receiver,
Baton Rouge, Louisiana.

Sirs: Under date of October 2, 1916, Fred J. Grace, register of the State land office, addressed this office concerning the claims asserted at various times by the State of Louisiana under the swamp-land grant to lands in T. 18 N., R. 14 W., shown by the survey of 1838 to be in Cross Bayou and Cross and Soda Lakes, and disclosed as land by the survey of 1871. Following a detailed description of these claims and a reference to a number of decisions bearing upon the question, the register goes on to say:

"The survey and field notes of 1838 show, as was stated by the surveyor general (Lewis), that the lands described in list 93 are in Cross and Soda Lakes, and they were and are navigable streams and belong to the State by right of its sovereignty, but they were in 1839 and 1850, and are yet, overflowed lands.

"The question to be determined by your department is one of fact: Whether the lakes are navigable or not. Under either conclusion by your department the lands come to the State of Louisiana, under the ruling of the Attorney General above referred to; if navigable, by right of its inherent sovereignty; if nonnavigable, under the swamp-land grants of 1849 and 1850.

"But if the land comes to the State by rights of its inherent sovereignty, the State desires to know what course will be pursued by your department. The local U. S. land office has allowed, and is permitting, entries to be made on the lands in this township, said lands being in the bed of these lakes, some selected as
6 swamp lands and others not. Those selected as swamp lands the State will be put to the trouble and expense and annoyance of proving their character in a hearing before the register and receiver, and the lands entered but not selected by the State, the State will not be permitted to be heard for the reason that the lands are not selected as swamp lands. But the State desires that your department take some action in this matter and advise the local officers of the U. S. Land Office to cancel and stop allowing entries on these lands until their true character has been determined by your department, for the State claims them by virtue of its sovereignty; and if its claim is not sustained, it maintains it has title to said land under the swamp-land grants of 1849 and 1850.

"The State of Louisiana transferred most of the land in the bed of Soda and Cross Lakes, in T. 18 N., R. 14 W., La. mer., many years ago, to the Caddo Levee Board, which has in turn disposed of the land, and now it is held by individuals."

The register also called attention to the decision favorable to the State in the case of Cross Lake Shooting and Fishing Club vs. Louisiana (224 U. S. 632).

The records here disclose that following a preliminary withdrawal of December 5, 1908, the township in question was, on July 2, 1910, included in petroleum reserve No. 4, and in view of this and other complications found to exist this office under date of April 23, 1919, submitted the matter to the department for instructions upon, as stated by the department in its response of September 2, 1919 (D–45134), substantially the following points:

1. "Should the Land Department be guided or controlled in its future actions by language contained in the decision rendered in the case of Cross Lake Club v. Louisiana, supra?

2. "Should Cross Lake and Soda Lake be deemed and treated as navigable and title to their beds considered as having vested in the State, following the holding made by the Acting Attorney General on September 11, 1916, in reference to Ferry Lake, which is the upper one of this group of lakes?

3. "What effect should be given to the petroleum withdrawal with reference to the State's claim?

4. "Should the survey of 1871 be still followed and deemed controlling in the premises?"

The department, after reviewing the history of the township as affected by the two surveys, court decisions, etc., advised and instructed this office in the premises as follows:

"In the data now before the department there is no evidence from which it can be gathered that Cross Lake or Soda Lake were ever in fact navigable bodies of water. There is nothing from which it

can be determined that said lakes were navigable in 1812, the date of the State's admission, or at any other time. The department is not favorably inclined to the suggestion of the register of the State land office regarding navigability in view of the fact that the State promptly upon the approval of the resurvey of 1871 filed swamp-land list for large areas in the lake beds in this and other townships to the north, and accepted approval of swamp lists, and has treated, dealt with, and claimed these surveyed lake beds as swamp for a great many years. The conclusion of the Acting Attorney
7 General as to the navigability of Ferry Lake, based upon the facts as found by him, does not require the Land Department, upon a very different state of facts and with a different situation present, to hold Cross Lake and Soda Lake to be navigable. For obvious reasons that opinion should not be deemed controlling here or construed as deciding or fixing navigability of the lakes named.

"* * * The Land Department, after the lapse of so many years, during which the State has acquiesced in such resurvey and has accepted and utilized the fruits thereof, will not upon the mere suggestion of the State respecting navigability or rights claimed to have been disregarded and invaded investigate the basis of the survey of these lake beds or examine into the merits of such survey.

"The survey of 1871, having been duly made, approved, and accepted, and being the latest and controlling survey of said T. 18 N., R. 14 W., will be followed in the future, as it has heretofore been in the past, in the adjudication of claims to public lands shown therein.

"The department has held that mineral lands do not pass or inure to the State under its swamp-land grant. The claim of the State is incomplete and inchoate until the fee title is granted by either patent or certification and the mineral character of claimed swamp land can be investigated and determined up to the time the legal title passes. See instructions of May 26, 1918 (46 L. D. 389). In case of State of Florida (47 L. D. —), decided upon appeal March 20, and upon rehearing May 14, 1919, a phosphate withdrawal was held to constitute a bar to the approval of the State's swamp selection. In instructions of April 26, 1915, unreported, the department concluded that there was such an intimate association and relation between oil and natural gas that lands withdrawn because of their oil deposits were also withdrawn for their gas content, and also that an oil withdrawal constituted a report that the lands were valuable for their deposits of natural gas. The reported production of gas in the southern portion of this township and upon neighboring lands amply demonstrates the wisdom of the existing withdrawal. Unless the State is prepared to and will show that its selected swamp lands within the withdrawn area are in fact nonoil and nongas in character, its list after due notice must be rejected and canceled. In this connection see the cases of State of California et al. (41 L. D. 592); State of Wyoming (45 L. D. 590, 46 L. D. 34); Buena Vista Land and Development Company v. Honolulu Consolidated Oil

Company (134 Pac. 1154), all involving State school selections intercepted by oil withdrawals.

"In the further consideration and disposition of swamp-land claims of the State of Louisiana, the views herein set forth will be followed and applied in all cases where properly applicable, and should the State deem itself aggrieved by the ruling of the commissioner in any specific case, an appeal to the department may be taken. In other words, nothing herein shall be construed so as to deprive the State of its day in court before the Land Department with due opportunity to be heard in respect to its claims and asserted rights."

For the purposes of this decision and as an aid to understanding, the facts relative to the two surveys in question will be briefly set forth here.

8 The first survey was made in 1838, and plat thereof approved by the surveyor general March 19, 1839. Other townships of the region were surveyed at about the same time. Among other meandered waters shown upon the plat of said township there appeared a portion of Cross Lake many hundred acres in extent, Cross Bayou, a part of Soda Lake, and Soda Bayou. An extension of resurvey of the township in question was made by Deputy Surveyor J. P. Parsons in 1871. The area in the lakes was, by the resurvey, returned as land duly sectionized and subdivided. The region of Cross Lake was marked on the plat, "Old bed of Cross Lake." The former meander lines of the two lakes were shown upon the plat of resurvey, the areas abutting thereon being lotted. Upon the plat of 1871 the following certificate is found:

"The south boundary of this township was surveyed by Terrell and Kelly and was paid for on the 29th day of June, 1837. The north, east, and west boundaries, sectional lines, and traverse were surveyed in 1838 by J. P. Terrell and A. W. Warren, dep. sur., under contract of 20th November, 1837, and instructions of February 5, 1838, and paid from the third quarter of 1838 to J. P. Terrell and R. N. Kelly. (See account approved August 1, 1838.)

"John P. Parsons, D. S., under contract with E. W. Foster, surveyor general of public lands for the State of Louisiana, dated July 17, 1871, resurveyed from the 10th of August to the 23rd of October, 1871, the first, second, third, fourth, and fifth miles of north boundary, the south boundary except the two first miles, the first and one-half of second mile of the west boundary, and 41.50 chains of the second mile of the east boundary. He also surveyed the sectional lines (except those between 7 and 8, 7 and 18, 8 and 17, 17 and 18, 13 and 24, 18 and 19, 23 and 24, 19 and 30, 35 and 36, and 7.50 chains between secs. 12 and 13); the traverse of Twelve Mile Bayou on both sides through secs. 1, 2, 11, and 14; the northern part of sec. 13, the traverse of Cross Lake through secs. 5 and 16; the traverse of Cross Bayou, except in front of Larking Edwards' claim, and the traverse of Red River in front of sec. 35.

"Subdivisions have been made as far as practicable to correspond with those of the map approved 19th March, 1839."

Upon the plat of 1839 the channel or pass which is now the connecting link, called Twelve Mile Bayou, between Caddo or Ferry Lake and associated ponded waters and Red River, was denominated Soda Bayou and was shown as a body of water separate and distinct from both Cross Lake and Soda Lake. The plat of 1871, upon which the lake areas are eliminated, shows Twelve Mile Bayou as a well-defined and duly meandered channel or waterway through the township, slightly changed perhaps, as to its course, but substantially in the same position as Soda Bayou, indicated upon the earlier plat of 1839.

Originally the mouth of the bayou appears to have been in sec. 24, about a mile above Shreveport, but it is gathered from the reports of Army engineers that some time before 1895 Red River cut back into or enveloped a part of the bayou where their courses parallel each other at a close distance, creating a new mouth in sec. 12, about five miles above the city. At the time of the examination by Capt. J. H. Willard, Corps of Engineers (about May 12, 1911), Twelve
9 Mile Bayou, which was a link in the so-called Jefferson-Shreveport Waterway, had a navigable depth at low water of about one foot. (See page 7, House Document No. 236, 63rd Congress, first session.)

Coming now to the swamp-land claims asserted by the State. In 1852 there was filed with the suveyor general for Louisiana a list No. 2 of selections, which was approved by him August 16 of that year and forwarded to this office.

The following tracts were described therein, necessarily based on the survey of 1838:

(A) All sec. 1, 602.72 acres.

(B) All lots east side of Bayou Soda in sec. 2, or fractional NE. ¼ and fractional SE. ¼, with areas, respectively, of 18.58 and 52.68 acres. (Practically identical with lots 1 and 19, as shown on the part of 1871.)

(C) All lots east side of Bayou Soda in sec. 11, 266.66 acres.

(D) All of sec. 12, 306.20 acres.

(E) All of sec. 13, 549.31 acres.

(F) All lots east side of Bayou Soda in sec. 14, 195.65 acres.

(G) All lots of sec. 23, 257.31 acres. (All lying in east half of section.)

(H) All sec. 24, 176.12 acres.

(I) All lots north side of Cross Bayou in sec. 25, 310.10 acres.

(J) Southwest fractional part of NW. ¼, sec. 25, estimated as 22 acres. (An unlotted area on the north side of Cross Bayou and abutting thereon, shown on the plat of 1871 as lot 11, containing 19.32 acres.)

Those selections were disposed of or adjudicated as follows:

(A) The W. ½, sec. 1, was approved May 23, 1856, supplemental list 1, Natchitoches.

The E. ½, sec. 1, was held for rejection April 11, 1895, for the stated reason that said tract had either been sold, located, or other-

wise disposed of prior to the date of the swamp grant. After due notice the selection was finally rejected July 26, 1895.

(B) The claim to all lots on the east side of Bayou Soda in sec. 2 was approved May 23, 1856, supplemental list 1, Natchitoches.

(C) The claim to all lots east side Bayou Soda in sec. 11 was approved May 23, 1856, supplemental list 1, Natchitoches.

(D) The claim to the west fractional half, sec. 12, was approved May 23, 1856, supplemental list 1.

The northeast fractional quarter, 45.40 acres, was finally rejected July 26, 1895, having been approved to the State for seminary purposes prior to the date of the swamp grant. Lot 6 (fractional SE. ¼), 2.70 acres, south of Red River, was rejected July 9, 1900 (prior sale by the U. S.).

(E) The claim to the W. ½ NE. ¼, west fractional half of the SE. ¼ and SE. ¼ NE. ¼, sec. 13, was approved May 23, 1856, supplemental list 1. The claim to the west fractional half of the section and the E. ½ SE. ¼ was approved January 14, 1860. The fractional NE. ¼ NE. ¼ (or lot 1) was rejected July 26, 1895 (prior sale by the U. S.).

(F) The claim to the east fractional half of sec. 14, east of Bayou Soda, was approved January 14, 1860. (This area, or these tracts, occupy the same relative position as lots 1, 9, 10, and 16 on the plat of 1871.)

10 (G) The claim to the SE. ¼, sec 23, was approved May 23, 1856. Land indemnity was granted for the fractional NE. ¼, sec. 23, April 8, 1899 (list 24).

(H) The claim to all lots of sec. 24 was finally rejected September 8, 1852, the lands having been approved to the State under the seminary grant in 1840.

(I) The claim to all lots on north side of Cross Bayou in sec. 25 was finally rejected July 26, 1895, the lands having been sold or disposed of prior to the swamp-land grant. (Approved to the State for seminary purposes.)

(J) The claim to the southwest fractional part of the NW. ¼, sec. 25, was finally rejected December 18, 1899, the tract having been approved to the State prior to the swamp grant as seminary lands.

It will be seen from the foregoing that all of the selections filed before the survey of 1871 have been disposed of either by approval or by final rejection.

October 31, 1871, the State selected, by list 13, based on the field notes of the later survey, the following-described lands in said T. 18 N., R. 14 W.

(1) All sec. 1, 607.24 acres.

(2) Lots 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 18, and 19, sec. 2, 294.64 acres.

(3) NE. ¼ NE. ¼, sec. 3, 38.32 acres.

(4) NE. ¼ (or lots 1, 2, 6, and 7) and E. ½ SE. ¼ (or lot 8 and SE. ¼ SE. ¼) sec. 11, 165.92 acres.

(5) All sec. 12 west of Red River, 295.38 acres.

(6) All sec. 13, 548.13 acres.

(7) All sec. 14 (lots 1 to 17), except lots 2, 3, 4, 5, 6, and 12, 368.76 acres.

(8) All sec. 23 west of Red River, 568.36 acres.

(9) Lots 1, 2, 3, and 4, sec. 24, west of Red River, 176.02 acres.

(10) All sec. 25 (except lots 13 and 14), 395.68 acres.

(11) All sec. 26 (except lot 5 and W. ½ NW. ¼), 484.24 acres.

(12) S. ½ sec. 27, 319.60 acres.

(13) N. ½ NE. ¼ and lots 1, 6, and 7, sec. 34, 167.12 acres.

(14) Lots 2, 3, and 5, sec. 35, 97.28 acres.

This list, with a number of others, describing lands in Ts. 19 and 20 N., R. 14 W., Ts. 20 and 21 N., R. 15 W., and T. 20 N., R. 16 W., was rejected in its entirety by letter "K" of this office addressed to the register and received at Natchitoches, under date of February 9, 1872, wherein it was stated that:

"Said lists of selections corrective of and additional to the lists formerly made, appear from the plats filed in this office to consist mainly of the beds of the former lakes. Such lakes being at the date of the swamp grant bodies of water and not land, did not pass to the State by said grant. The selection of such tracts as swamp land is, therefore, unauthorized and illegal, and the claim of the State thereto is rejected."

The department, however, subsequently, under date of January 15, 1879, rendered a decision in the matter, holding that, while the plat of 1838 showed the lands involved to be in the lakes, there was no evidence to show that the land was not swamp and overflowed in 1849 and 1850, and that it did not pass as such to the State under the grant. It was accordingly directed that the State's
11 claim be adjusted under the rules applicable to the swamp grant. List 13 was, pursuant thereto, made of record and the selections therein adjudicated and disposed of as follows: It appears, however, as will shortly be shown, that in the meantime the Land Department disposed of a number of the tracts claimed by the State.

Selection No. 1 was canceled October 29, 1897, the claim having been originally asserted August 16, 1852, in list 2, and finally adjudicated, either by approval or rejection, upon basis of the original selection. (See Item "A.")

Selection No. 2 was held for rejection July 12, 1897, as to lots 1 and 19, and finally rejected October 29, 1897, the claim thereto having been asserted August 16, 1852, and finally adjudicated upon basis of the original selection. (See Item "B.")

The claim to lots 2, 3, 4, 7, 8, and 9 was finally rejected March 17, 1890, the office holding (after an examination by a special agent and default by the State at a hearing subsequently ordered) that the lands were not swamp and did not pass under the grant. Said lots 2, 3, 4, 7, 8, and 9 (with lot 6) were subsequently (November 29, 1892) entered as a homestead by William Woolworth and patented January 28, 1897. Lots 10 and 11 were finally rejected July 2, 1900, after due notice to the State under the provisions of the circular of December 13, 1886 (5 L. D. 279), Ira Ray having made homestead

entry 5372 therefor September 21, 1892, subject to the swamp-land claim. Ray's entry, which also included lots 12 and 13, was patented September 7, 1900, lot 5 was approved April 17, 1884, List 8. Lot 18 was held to be swamp land by the field notes May 13, 1916, and an adverse claim (07542 Baton Rouge). Canceled to that extent.

Selection No. 3 was rejected July 26, 1895, the tract having been sold, located, or disposed of prior to the date of the swamp-land grant.

Selection No. 4 was rejected October 29, 1897, as to lots 1 and 7, sec. 11, a claim thereto having been asserted August 16, 1852, and finally adjudicated either by approval or rejection upon basis of the original selection. (See item "C," list of August 16, 1852.) Lots 2, 6, 8, and SE. ¼ SE. ¼ were approved November 9, 1901, list 98.

Selection No. 5 (all sec. 12 west of Red River) was rejected October 29, 1897, claim thereto having been asserted August 16, 1852, and finally disposed of either by approval or final rejection upon basis of the original selection. (See item "D.")

Selection No. 6 was rejected October 29, 1897, a claim thereto having been asserted August 16, 1852, and finally disposed of either by approval or rejection upon basis of the original selection. (See item "E.")

Selection No. 7 was canceled October 29, 1897, to lots 9, 10, and 16, and July 2, 1900, as to lot 1, these tracts in sec. 14 having been originally claimed August 16, 1852, and finally adjudicated upon basis of the original selection. (See item "F.") The claim to lot 7 was finally rejected March 17, 1890, the office holding (after an examination by a special agent and default by the State at a hearing subsequently ordered) that the tract was not swamp and did not pass to the State. Lot 8 of sec. 14 was approved October 21, 1899, and patented to the State December 28, 1899.

The claim to lots 11, 13, 14, and 17, sec. 14, apparently is pending; but the records of this office show that lots 11 and 14 were
12 entered September 3, 1876, by John G. McWilliams (H. E. 1189), commuted to cash June 15, 1878, and patented March 1, 1879; lot 13 (with lot 12) was entered January 11, 1877, by Robert H. Ford (H. E. 1239) and patented November 13, 1884.

Lot 17 was embraced in cash entry 18104, made March 2, 1881, by James L. Robertson, upon which patent issued December 5, 1884.

Selection No. 8 was canceled as to lots 1 and 2 (in NE. ¼) and SE. ¼ October 29, 1897, a claim thereto having been asserted August 16, 1852, and disposed either by approval or final rejection upon basis of that selection. (See item "G.") The W. ½ sec. 23 was rejected March 17, 1890, the office holding (after an examination by a special agent and default by the State at a hearing subsequently ordered) that the tract was not swamp and did not pass under the grant.

Selection No. 9 was rejected and canceled October 29, 1897, a claim to these lands having been asserted August 16, 1852, in list 2, and finally adjudicated either by approval or rejection upon basis of the original selection. (See item "H.")

Selection No. 10 was approved February 13, 1900 (list 77), as to lot 10 (16.28 acres). Lots 1, 2, 3, 4, 5, 6, 7, 8, and 11 are noted as finally rejected October 29, 1897, a claim thereto having been asserted in list 2 and finally adjudicated either by approval or rejection upon basis of the original selection. (See Item "I.") The claim of the State to lots 12 and 15 (south of Cross Bayou) apparently is pending. Lot 12, however, was entered as a homestead May 7, 1872, by Daniel Dodez, commuted to cash (17834), and patented December 10, 18'8. Lot 15 was entered as a homestead February 24, 1872, William D. Wylie, commuted to cash (17830), and patented in 1874. There is no lot 9 in the section according to the plat.

Selection No. 11 was approved October 21, 1899 (list 70), as to lot 3 (or SW. ¼ SW. ¼) and NW. ¼ SW. ¼, sec. 26. Lots 2 and 4 (or E. ½ SW. ¼), were approved November 6, 1902 (list 105). The E. ½ NW. ¼ and W. ½ NE. ¼ were finally rejected March 17, 1890, the office holding (after an examination by a special agent and default by the State at a hearing subsequently ordered) that the lands were not swamp and did not pass under the grant. The NE. ¼ SE. ¼ was embraced in patented cash entry No. 17834 by Daniel Dodez, referred to above. Lots 1, 6, and 7 were embraced in H. E. 697, made March 26, 1872, by Kim Austin, commuted to cash (17831), and patented April 15, 1875. Fractional sec. 26 (south of Cross Bayou or Lake), 65.86 acres (old plat) was patented to James Blair Gilmore and Seth Sheldon, September 1, 1846, cash entry 2009. (Occupying position of lot 5, plat of 1871.)

The E. ½ NE. ¼, sec. 26, was entered as a homestead by William B. Wisenor May 20, 1872, and patented March 30, 1888. The E. ½ NW. ¼, sec. 26, was selected by the State August 24, 1882, as school indemnity, and approved to the State October 4, 1909, list 4, Natchitoches.

The claim of the State is apparently pending to the E. ½ NE. ¼, NE. ¼ SE. ¼, and lots 1, 6, and 7, sec. 26, but all of the lands have heretofore been disposed of by the United States, as indicated herein.

Selection No. 12 (S. ½ sec. 27) was approved November 9, 1901, per list 98, as to the SW. ¼. The SE. ¼ was rejected March 22, 1890. The N. ½ SE. ¼ is embraced in H. E. 3871 by Taylor Williams,
13 made October 22, 1888, commuted to cash and patented August 21, 1890. The S. ½ SE. ¼ said sec. 27, and the N. ½ NE. ¼ sec. 34 were embraced in H. E. 3447, made July 6, 1887, by Young I. Dowden, commuted to cash and patented June 19, 1890. Both of these entries were made subject to the swamp-land claim of the State so far as in conflict. Both entrymen filed nonswamp affidavits as required by rule 1 of circular dated December 13, 1886 (5 L. D. 279). Notice thereof was served on the State and no protest or application for a hearing was filed, and its claim was rejected under rule 4 of said circular.

Selection No. 13 was rejected March 22, 1890, as to the N. ½ NE. ¼ sec. 34. (See Item 12.) The State's claim to lots 1, 6, and 7, sec. 34, appears to be pending. Lots 1 and 6, however, were embraced in

H. E. 740, made June 17, 1872, by May Berry Richardson, commuted to cash and patented May 20, 1873. Lot 7 was embraced in H. E. 722, made May 16, 1872, by Arsene Girod, commuted to cash and patented May 20, 1873.

Selection No. 14 (lots 2, 3, and 5, sec. 35), was approved to the State April 17, 1884, list No. 8.

From the foregoing it would appear that the State's claim is pending under list 13 to lot 18, sec. 2; lots 11, 13, 14, and 17, sec. 14; lots 12 and 15, sec. 25; the E. ½ NE. ¼, NE. ¼ SE. ¼, and lots 1, 6, and 7, sec. 26; and lots 1, 6, and 7, sec. 34. Of these lands all have been disposed of by patent except lot 18, sec. 2. With the issuance of patent the jurisdiction of the Land Department over the lands was divested and terminated, if, in fact, it was not equivalent to an adjudication that the lands entered were of the character and class subject to such entry. (30 L. D. 626.)

April 24, 1901, the register of the State land office, by a communication addressed to the surveyor general for Louisiana, requested that the following-described lands in T. 18 N., R. 14 W., be listed and approved to the State as swamp lands, viz:

Lots 3 and 6, sec. 1; lots 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, and 18, sec. 2; NW. ¼ NE. ¼ and lots 1 and 2, sec. 3; lot 7, sec. 5; lots 2, 3, 4, 5, 6, 7, 8, 9, and 10, sec. 8; lot 6, sec. 9; fractional SW. ¼ and lots 4, 5, and 6, sec. 10; lots 2, 6, and 9, sec. 11; lots 1, 2, 3 5, 6, 7, 8, 11, 12, 13, 14, 15, and 17, sec. 14; fractional NE. ¼, or lots 1 and 4, sec. 16; lot 3, sec. 19; lots 5, 6, 7, 8, 10, SE. ¼ SW. ¼ and S. ½ SE. ¼, sec. 20; SE. ¼ sec. 21, all sec. 22, N. ½ SW. ¼ (affidavits describe N. ½ and SW. ¼ sec. 23); all sec. 26; all sec. 27; all sec. 28.

In support of this request the State register transmitted the affidavit of F. A. Leonard and the joint affidavit of S. H. Sibley, B. H. Bickman, F. S. Cain, T. C. Lewis, A. H. Leonard, and D. C. Heine, alleging the lands to be swamp in character.

The action had in regard to the foregoing application up to February 21, 1905, when a list (No. 93) of selections embracing a portion of the tracts applied for, was officially made of record in this office, is best disclosed by quoting in full letter of September 16, 1904, addressed to the U. S. surveyor general for Louisiana.

"On July 13, 1901, you transmitted the papers relating to the application of the State of Louisiana to have you report as swamp land certain tracts in T. 18 N., R. 14 W., on appeal from your action in the matter.

"In your decision of June 15, 1901, addressed to the register of State lands, you declined to report lots 5, 6, and 10 of sec. 8, for the reason that the field notes of survey do not show them to have been swamp lands; fr'l NE. ¼ of sec. 23, for the reason that the tract was reported in a list dated August 16, 1852; and that part of sec. 26 lying south of the old meander line of Cross Lake, for the reason that the field notes do not show the land to be swamp and overflowed land. As to the rest of the tracts you held that, although they are mostly all shown to be swamp lands, you declined

to report them, for the reason that the former survey of the township shows them to consist of Soda and Cross Lakes.

"By office letter "K" of Dec. 4, 1901, your action was modified and you were instructed, upon the State's providing for the necessary expenses, to appoint an experienced and faithful deputy to examine the land in the field, as provided for by sec. 2 of the act of March 2, 1849 (9 Stat. 352).

"The deputy was appointed, but afterwards his appointment was recalled, and Mr. E. D. Stanford, special agent of this office, was detailed to make the examination. The instructions to the special agent were recalled June 2, 1902, by order of the Secretary and a report on the case was made to the department June 10, 1902.

"The matter remained suspended until January 14, 1904.

"On Jan. 14, 1904, the Secretary directed that the case be reexamined in accordance with the instructions of Oct. 1, 1903 (32 L. D. 270) 'and in the light of this decision,' i. e., the decision of Jan. 14, 1904. A copy of the Secretary's decision was sent to you on February 17, 1904, and the case was remanded for your reexamination in accordance with the departmental decisions; and you were further instructed to submit a list of the tracts found by you to be swamp lands, omitting any tracts theretofore reported as a claim of the State under the swamp-land grants, or finally disposed of under the laws for the disposition of the public lands.

"On March 2, 1904, in a decision addressed to the register of State lands, you took action on the matter and again declined to report the land, as swamp land, assigning the following reasons, viz:

"That the following tracts were approved to the State, June 24, 1840, for seminary purposes: Lots 3 and 6 of sec. 1, being a part of the E. ½ of the section.

"That the following tracts were included in a list of swamp lands reported Oct. 31, 1871:

Lots 4, 7, 8, 9, 10, 11, and 18	Sec. 2
Lots 2 and 6	" 11
Lots 1, 7, 8, 11, 13, 14, 15, and 17	" 14
N. ½ of SW. ¼	" 23
All of (except lot 5 and W. ½ of NW. ¼)	" 26
S. ½	" 27

"That the following tracts have been entered under various laws and the entries have heretofore been carried into patent:

Lots 12 and 13	Sec. 2
Lots 2, 3, 7, 8, 9, and 10	" 8
SW. ¼	" 10
Lot 2	" 14
Lots 5 and 6	" 20
S. ½ of SE. ¼ and SE. ¼ of SW. ¼	" 20

15 "That the following tracts have been approved to the State to aid in the construction of the Vicksburg, Shreveport and Texas Railroad:

Lot 7 of sec. 5, and lot 3 of sec. 19.

"That the NE. fr'l ¼ (or lots 1 and 4) of sec. 16 was reserved for school purposes.

"That the following tract was included in a list of swamp lands reported Aug. 16, 1852:

NE. ¼ ---------- Sec. 23

"That the following tracts are not swamp land by the showing of the field notes:

Lots 5 and 6 ---------- Sec. 8
Lot 5 ---------- " 26

"Eliminating the tracts above described from the list accompanying the application from the State, the following tracts remain:

Lots 6, 14, and 17 ---------- Sec. 2
N.W. ¼ of NE. ¼ and lots 1 and 2 ---------- " 3
Lot 4 ---------- " 8
Lot 6 ---------- " 9
Lots 4, 5, and 6 ---------- " 10
Lot 9 ---------- " 11
Lots 3, 5, 6, and 12 ---------- " 14
Lots 7, 8, and 10 ---------- " 20
SE. ¼ ---------- " 21
All of ---------- " 22
NW. ¼ and S. ½ of SW. ¼ ---------- " 23
W. ½ of NW. ¼ ---------- " 26
N. ½ ---------- " 27
All of ---------- " 28

"After considering the matter and referring to the instructions of Oct. 1, 1903 (32 L. D. 270), and the departmental decision of Jan. 14, 1914 (not reported), you held, in regard to the lands last above described:

"'* * * in view of the fact that the field notes of the survey nearest in point of time to the date of the grant show the lands to be lakes and not swamp or overflowed lands, I must decline to make the selection.'

"The State appealed from your decision.

"The appeal does not allude to any of the tracts mentioned in your decision as having been embraced in the lists of Aug. 16, 1852, and Oct. 31, 1871, nor to those tracts approved to the State for seminary purposes, nor to those tracts that have been patented to claimants under the various laws for the disposal of the public lands, and it is evident, therefore, that the State abides by your decision as regards those tracts.

"It is alleged that you erred in holding in effect that lot 7 of sec. 5 and lot 3 of sec. 19, which had been approved to the State for railroad purposes; and lots 1 and 4 of sec. 16, reserved for schools, ex-

cepted the tracts from the claim of the State under the swamp grant.

16 "Your action in regard to the four lots last above described was proper, as title to lot 7 of sec. 5, and lot 3 of sec. 19 passed to the State July 18, 1896, with the approval for railroad purposes; and the title to the lots in sec. 16 on the date of survey.

"Exception is also taken to your action in not considering the affidavits presented with the case as regards lot 5 and 6 of sec. 8, and lot 5 of sec. 26, which you hold are not shown to be swamp land by the field notes.

"In the matter of the three lots above mentioned, I am of the opinion that you should not consider the affidavits. Whatever may have been the practice relative to the State's initiation of swamp-land claims on the ex parte testimony of its own witnesses in the early days of the adjustment of the claims, it is no longer permissible, since by rule 1 of the Louisiana Instructions of Oct. 1, 1903, the application not being a pending selection made by surveyors general or by agents of the State, in the contemplation of the rule, the following applies:

"'All future selections under said grants will be disposed of according to the showing evidenced by the field notes of survey alone—last subdivision of rule 1.'

"The reason for this is that the Secretary's instructions are based on then existing claims of record, of which he had statements in the form of a brief from the State's attorney and a report from the General Land Office.

"If this view were not in every way correct it would follow that the large number of applications made to you by the State to report lands to this office on the basis of affidavits, and the numerous lists actually reported by you during the period between Mar. 18, 1901, the date of the departmental instructions suspending action on Louisiana claims, and directing that a rule be served on the State's attorney to show cause why the order of this office allowing hearings should not be vacated; and Oct. 1, 1903, the date of the departmental instructions, prescribing rules for the adjustment of the grants applicable to Louisiana, under which it is contended by the State's attorney that all selections made on the basis of affidavits must be approved or patented to the State without inquiry as to the real character of the lands.

"The contention, in effect, gives to the words 'or by affidavits filed at the time of selection under the practice hereinbefore referred to,' in rule 1, all the force and effect of a confirmatory act, such as is the act of Mar. 3, 1857 (11 Stat. 251). The lists of that character reported by you during the period of suspension amount to 218,058.83 acres. That it was the intention of the Secretary's office to confirm these lands is at least questionable, since they were not made of record in this office on Oct. 1, 1903—nor could they be, as the adjustment of the claim was suspended by the Secretary's instructions of Mar. 18, 1901.

"You will therefore not consider the affidavits submitted in this case as proper testimony.

"As to that part of your decision in which you say, after referring to the specific tracts—

"'Therefore, in view of the fact that the field notes of the survey nearest in point of time to the date of the grant show the lands
17 to be lakes and not swamp and overflowed lands, I must decline to make the selection'—

I am of the opinion that you erred, and your decision as to these tracts is reversed, and the appeal, in so far as it relates thereto, is sustained for the following reasons:

"The lands were disclosed by the survey of 1871, and the field notes of that survey, which is the valid and subsisting one, should govern, especially as there was no survey of the lands in 1838, and while the plat of 1838 indicates them to fall in the lake, the field notes of survey have no bearing on the tracts in question. Again, the Secretary's decision of Jan. 14, 1904, holds, in effect, that Soda and Cross Lakes were not permanent bodies of water but were overflowed lands, and that this condition should not be confounded with that of lands covered by an apparent permanent body of water not the result of an overflow, like an inland lake, which depends for its permanency upon other causes.

"You will prepare and submit a list of swamp lands to this office, embracing the tracts which you declined to report because the field notes of the survey of 1838 showed them to be in Cross and Soda Lakes.

"A copy of the list must be sent to the district land officers at Natchitoches and to the register of State lands, retaining, of course, the original in your office.

"Advise the proper State authorities of this decision, allow the usual right of appeal, and in due time make full report in the matter to this office."

The said list, as made up by the surveyor general from the approved field notes of 1871, and eventually made of record, describes the following tracts:

(15) Lots, 6, 14, 16, and 17, sec. 2.
(16) Lots 1, 2, and NW. ¼ NE. ¼, sec. 3.
(17) Lot 4, sec. 8.
(18) Lot 6, sec. 9.
(19) Lots 4, 5, and 6, sec. 10.
(20) Lot 9, sec. 11.
(21) Lots 3, 5, 6, and 12, sec. 14.
(22) Lots 7, 8, and 10, sec. 20.
(23) SE. ¼, sec. 21.
(24) All of sec. 22 (lots 1 and 2, or NW. ¼ NW. ¼, NE. ¼ NW. ¼, S. ½ NW. ¼, NE. ¼, SE. ¼ and SW. ¼).
(25) NW. ¼ and S. ½ SW. ¼, sec. 23.
(26) W. ½ NW. ¼, sec. 26

(27) N. ½, sec. 27.
(28) All sec. 28.

These selections were disposed of or adjudicated as follows:

(15) Lot 6, sec. 2, was finally rejected June 28, 1905, after due notice to the State, said tract (with lots 2, 3, 4, 7, 8, and 9) having been embraced in H. E. of William Woodworth, made November 29, 1892, and patented January 28, 1897. (See item 2, list of October 31, 1871.) Lot 14 was held for rejection April 18, 1916, and finally rejected June 9, 1916, the tract not being shown as swamp by the field notes on file in this office, which were carefully examined. Lot 17 was held for rejection November 12, 1915, and finally
18 rejected May 13, 1916, inasmuch as the field notes on file here did not show the said tract to be swamp in character. Said lots 14 and 17 are embraced in H. E. 08947, made March 27, 1919, by James Wilkinson.

(16) The claim to lots 1 and 2 NW. ¼ NE. ¼, sec. 3, was held for rejection April 18, 1916, and finally rejected June 9, 1916, after due notice to the State, the decision stating that the field notes did not show the lands to be swamp. It appears (however, and this fact was manifestly overlooked when the above action was taken, that under date of September 10, 1906 (K), considering the conflicting claim of the Vicksburg, Shreveport and Pacific Railroad for these tracts, the office held:

"The lands in question were disclosed by the survey of 1871, prior to which time they were covered by the waters of Cross and Soda Lakes, and swamp-land list No. 93 was reported under the instructions contained in departmental decision of Jan. 14, 1904, which decision, in effect, held that Cross and Soda Lakes were not permanent bodies of water but were overflowed lands, and that such condition should not be confounded with that of lands covered by an apparent permanent body of water not the result of an overflow, like an inland lake, which depends for its permanency upon other causes.

"Rule 6 of the instructions of Oct. 1, 1903 (32 L. D., 270), provides that all existing contests or controversies in which there is no claim of actual bona fide preemption or homestead settlement, must be determined according to the showing made by the field notes of survey. The claim of the railroad company was asserted prior to Oct. 1, 1903, and while the swamp land list was not reported until Feb. 15, 1905, the matter had been pending before the department since July 31, 1901, when the case was transmitted to this office by the surveyor general on appeal from his decision of June 15, 1901.

"The swamp claim to the tracts in question is based on the field notes of the survey of Deputy John P. Parsons, made in 1871, and such notes show that greater part of each smallest legal subdivision thereof to be swamp and overflowed land within the meaning of the swamp-land laws, and the railroad company will be allowed sixty days within which to show cause why its selection of the tracts should not be canceled for the reasons above stated. In the event of failure to make such showing within the time allowed, or to appeal

herefrom, the selection will be canceled without further notice and to that end it is hereby held for cancellation."

The railroad company took no appeal from this holding and its selection was finally canceled January 28, 1907. At the same time the local officers were instructed to allow no disposition of the lands without special directions from this office.

The records here show, however, that lot 1 and the NW. ¼ NE. ¼ said sec. 3 were entered September 5, 1916, as a homestead (08056) by William H. Clark. No claim to lot 2, sec. 3, adverse to that of the State is disclosed.

(17) Lot 4, sec. 8, was held for rejection April 18, 1916, and finally rejected June 9, 1916, the tract being shown as nonswamp, according to the field notes on file here. This tract is embraced in H. E. 08147, made November 27, 1916, by James Evins.

19 (18) Lot 6, sec. 9, was, by decision of this office, dated July 8, 1905, held to be swamp, and homestead entry 7097 in the name of William H. Keller, embracing the same was canceled. It appears, however, that on August 18, 1917, John George filed homestead application 08434 for said lot 6 (or SW ¼ NW¼), sec. 9 (52.10 acres), which was rejected by the local officers, because the track was swamp land and inured to the State. September 29, 1917, George filed nonswamp affidavit and appeal, which remains unacted upon here.

May 6, 1918, Tony Carroll filed application 08699 for said tract, together with nonswamp affidavit. The local officers inadvertently allowed this application, report to that effect being made by them under date of November 14, 1918. The entry, however, remains of record. John George has filed a protest in the matter.

(19) Lots 4, 5, and 6, sec. 10, are shown by the field notes on file here to be swamp and were so held by decision of this office, dated March 9, 1905, in the case of Levi Cooper and A. H. Leonard vs. Alfred Hamlin. Hamlin's entry (6934) for said tracts was thereafter canceled. It appears, however, that on April 10, 1916, the local officers allowed homestead entry 07918 therefor in the name of Henry James Lear, subject to the swamp-land claim. The State was advised of such allowance pursuant to circular of December 13, 1886 (5 L. D. 279), and filed objections. Hearing was ordered to be held March 16, 1917, before a United States commissioner at Shreveport, and testimony was submitted accordingly. Letter "G," of March 23, 1917, advised the local officers that under the department's instructions of October 1, 1903 (32 L. D. 270), all controversies as to the character of lands thereafter claimed by the State upon the showing made by the field notes should be decided by the field notes alone, and directions were given to promptly recall all notices of contest theretofore sent out. Inasmuch, however, as testimony in the Lear case had already been taken, the local officers rendered a decision in the matter, holding that the lands were swampy in character at the date of the grant and inured to the State thereunder. Appeal was filed by Lear, and the same is now pending before this office.

(20) Lot 9, sec. 11, is shown by the field notes on file here to be swamp land. November 5, 1917, the local officers allowed John E. Fuller to make homestead entry 08533 therefor, subject to the State's swamp-land claim to be decided by the field notes. Fuller submitted commutation proof January 25, 1919, the same being suspended by the local officers and transmitted to this office for consideration.

(21) Lots 3, 5, 6, and 12, sec. 14, are shown by the field notes here to be swamp in character. Lots 3, 5, and 6 are embraced in H. E. 07998, made June 23, 1916, by Frank Solomon. Said entry was held for cancellation by this office October 13, 1916, and the claimant has filed no appeal, notice having been duly served upon him. Final cancellation of this entry may be effected at any time, removing all conflict with the swamp-land claim.

According to the records here lot 12, sec. 14, was entered in 1877 as a homestead by Robert H. Ford, patent issuing thereon November 13, 1884. (See item 7, list of October 31, 1871.)

20 (22) The claim to lots 7 and 8, sec. 20, was held for rejection by this office March 15, 1905, and finally rejected June 28, 1905, after due notice to the State, the tracts having been entered by Jesse Taylor as a homestead (H E. 2442), December 23, 1882, and patented November 19, 1889. Lot 10, sec. 20, is shown by the field notes on file in this office to be swamp in character. Said tract is embraced in H. E. 08136, made December 17, 1916, by Ed. Martin, subject to the State's swamp land claim.

(23) The SE. ¼, sec. 21, is shown by the field notes on file here to be swamp in character. The lands are embraced in H. E. 08821, made October 25, 1918, by John W. Pike, subject to the swamp-land claim and to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

(24) The State's claim to the E. ½ NW. ¼ and E. ½ SW. ¼ sec. 22 was finally rejected by this office September 22, 1909. Henry Kuhn originally made homestead entry for these tracts October 31, 1900. He was called upon in 1905 to file a nonswamp affidavit, and this he failed to do. His entry was accordingly canceled June 15, 1906. Later (May 26, 1909) the entry was reinstated upon a showing that claimant had not received notice of the requirement made. This reinstatement was subject to the swamp-land claim of the State, which was duly notified of the allowance of the entry and of the filing by Kuhn of a nonswamp affidavit. No action was taken, and the swamp claim was finally rejected as above set forth. Kuhn's entry (03908) was patented June 18, 1917.

The NE. ¼ sec. 22 appears by the field notes on file here to be swamp in character. The S. ½ said NE. ¼ is embraced in H. E. 07879, made February 15, 1916, by Walter Ellis Smith. This entry was held for cancellation April 22, 1916, for conflict with the swamp-land claim; and although the entryman did not formally appeal, two communications from him, of date May 20 and 22, 1916, may be considered as such. Final action in the matter has not been taken. April 6, 1916, the same party presented additional homestead applica-

tion (07926) under the act of April 28, 1904, for the N. ½ of said NE. ¼ sec. 22. This application was rejected by the local officers under date of April 30, 1916, because the original entry (07879) had been held for cancellation, as above set forth, and the entryman filed an informal appeal from this ruling. Final action has not been taken. Both these applications were made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

The SE. ¼ sec. 22 appears by the field notes on file here to be swamp in character. The S. ½ SE. ¼ is embraced in H. E. 08322 in the name of Thomas Arthur Harvey, made May 21, 1917. The N. ½ SE. ¼ is embraced in H. E. 07881, in the name of Walter Pate Walden, made February 23, 1916. Both entries were made in accordance with and subject to the provisions of the act of July 17, 1914 (38 Stat. 509).

Lot 2, 5 acres (in the NW. ¼ NW. ¼), is embraced in cash entry 2194, Natchitoches, made November 2, 1840, by Dickson Harding et al. The entry was approved for patenting March 22, 1899, but it does not appear that patent has ever issued, although no reason is now apparent why it should not. Appropriate steps looking to the issuance of patent thereon have been taken.

21 Lot 1, 26.84 acres (in the NW. ¼ NW. ¼), the SW. ¼ NW. ¼ and W. ½ SW. ¼, are shown by the field notes on file here to be swamp in character. These tracts are embraced in H. E. 07948, made May 16, 1916, by Thomas A. Harvey, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

(25) The selection of NW. ¼ and S. ½ SW. ¼ sec. 23 was held for rejection by this office under date of September 30, 1915, and finally rejected December 3, 1915, the claim having been originally asserted in list 13 of October 31, 1871, and disposed of March 17, 1890, upon basis of that selection. (See item 8 of list referred to.)

It appears, however, and this fact was manifestly overlooked when the action of September 30, 1915, was taken that under date of September 10, 1906, by letter "K" the claim of the State to these tracts, as asserted in list 93, had been considered, the adjudication of March 17, 1890, in effect set aside, and the validity of the selection as asserted in said list 93 affirmed. In this connection the record shows that in 1884 and while the State's earlier swamp claim of October 31, 1871, was pending unadjudicated, the said NW. ¼ and S. ½ SW. ¼ sec. 23 were selected by the Vicksburg, Shreveport and Pacific Railroad, per list 2, dated August 21, 1884, as insuring to it under the grant of June 3, 1856 (11 Stat. 18), upon definite location of its line as of date March 27, 1857; and when in 1890 adverse action was taken against the swamp selection of October 31, 1871, the railroad selection was left intact. But when in 1906 the office had under consideration the reasserted swamp claim based on the field notes of the Parsons survey, the holding quoted in connection with item 16 was made. The railroad took no appeal from this holding and its selection was finally canceled January 28, 1907.

At the same time the local officers were directed to allow no disposition of the lands without special instructions from this office. Manifestly the action of September 30, 1915, was inadvertent and erroneous.

The records here disclose no claim to the E. ½ NW. ¼ and S. ½ SW. ¼, said sec. 23, adverse to that of the State. It appears, however, that on June 24, 1919, the local officers allowed Morris Foster Leeds to make H. E. 09039 for the W. ½ NW. ¼, said section, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

(26) The W. ½ NW. ¼ sec. 26 is shown by the field notes on file here to be swamp in character. Said tract is embraced in H. E. 07762, made November 26, 1915, by Jesse M. Jolly, subject to the swamp land claim and to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

(27) The claim to the S. ½ NE. ¼ sec. 27 was held for rejection March 15, 1905, and finally rejected June 28, 1905, after due notice to the State, the tract being embraced in H. E. 3871, dated October 2, 1888, in the name of Taylor Williams, commuted to cash and patented August 21, 1890. (See item 12, list of October 31, 1871.)

The claim to the N. ½ NE. ¼ sec. 27 was held for rejection September 11, 1906, and finally rejected January 28, 1907, after due notice to the State, the tract having been approved to it July 8, 1896, per list No. 9, to aid in the construction of the Vicksburg,
22 Shreveport and Pacific Railroad under the grant of June 3, 1856 (11 Stat. 18). The office decision held that inasmuch as the State had received and accepted title under one grant, it was estopped from asserting a claim to the same land under another grant. (28 L. D. 455.)

The NW. ¼ sec. 27 is shown by the field notes of survey on file here to be swamp in character, and it was so held and decided by office decision "K" of July 19, 1905, ruling that homestead entry, made August 14, 1889, in the name of John T. Martin, for the same lands and commuted to cash December 1, 1902, should be canceled. The office held at the same time that the selection of said tract August 21, 1884, by the Vicksburg, Shreveport and Pacific Railroad should be canceled, and such action was taken April 14, 1906. The homestead application (08966) of Rell S. Theriot, for said tract, rejected by you, is now pending before this office on appeal.

(28) The claim of the State to the N. ½ NW. ¼ sec. 28, was held for rejection by this office under date of March 15, 1905, and finally rejected June 28, 1905, after due notice to the State. Said tract was embraced in the homestead entry of Andrew Estes, dated June 23, 1898, upon which final certificate 4439 issued September 1, 1903, and patent November 1, 1904.

The NE. ¼, S. ½ NW. ¼, SE. ¼, and SW. ¼ sec. 28 are shown by the field notes on file here to be swamp in character. The E. ½ NE. ¼ and E. ½ SE. ¼ are embraced in H. E. 07982, made June 12, 1916, by Robert B. Clark, subject to the swamp-land claim. The

W. ½ NE. ¼ and S. ½ NW. ¼ are embraced in H. E. 08043, made September 14, 1916, by Charlie Foster, subject to the swamp-land claim. The W. ½ SE. ¼ is embraced in H. E. 08781, made August 8, 1918, by John M. Farries, jr., subject to the swamp-land claim and to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509). The SW. ¼ is embraced in H. E. 07712, made October 22, 1915, by Joseph W. Eckardt, subject to the swamp-land claim and to the provisions and reservations of the act of July 17, 1914. (38 Stat. 509.)

In conclusion: It is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp or overflowed, and, if nonmineral in character, inure to the State under its grant, and may be patented pursuant thereto when the record has been cleared of adverse claims:

Lot 18, sec. 2. No adverse claim of record.

Lots 1 and 2 and NW. ¼ NE. ¼, sec. 3. Lot 1 and NW. ¼ NE. ¼, claimed adversely by William H. Clark under H. E. 08056.

Lot 6, sec. 9. Claimed adversely by John George under application 08434. Also embraced in erroneously allowed entry 08699 in name of Tony Carroll.

Lots 4, 5, and 6, sec. 10. Claimed adversely by Henry James Lear, H. E. 07918.

Lot 9, sec. 11. Claimed adversely by John E. Fuller, H. E. 08533.

Lots 3, 5, and 6, sec. 14. Claimed adversely by Frank Solomon, H. E. 07998.

Lot 10, sec. 20. Claimed adversely by Ed Martin, H. E. 08136.

SE. ¼ sec. 21. Claimed adversely by John W. Pike, H. E. 08821.

NE. ¼ sec. 22. Claimed adversely by Walter Ellis Smith, H. E. 07879, and application 07926.

23 SE. ¼ sec. 22. S. ½ SE. ¼ claimed adversely by Thomas Arthur Harvey, H. E. 08322, and N. ½ SE. ¼ claimed adversely by Walter Pate Walden, H. E. 07881.

Lot 1, SW. ¼ NW. ¼, and W. ½ SW. ¼ sec. 22. Claimed adversely by Thomas A. Harvey, H. E. 07948.

NW. ¼ and S. ½ SW. ¼ sec. 23. W. ½ NW. ¼ claimed adversely by Morris Foster Leeds, H. E. 09039.

W. ½ NW. ¼ sec. 26. Claimed adversely by Jesse M. Jolly, H. E. 07762.

N. W. ¼ sec. 27. Claimed adversely by Rell S. Theirot, homestead application 08966.

NE. ¼, S. ½ NW. ¼, SE. ¼, and SW. ¼ sec. 28. The E. ½ NE. ¼ and E. ½ SE. ¼ claimed adversely by Robert B. Clark, H. E. 07982. The W. ½ NE. ¼ and S. ½ NW. ¼ claimed adversely by Charlie Foster, H. E. 08043. The W. ½ SE. ¼ claimed adversely by John W. Farries, jr., H. E. 08781.

The SW. ¼ sec. 28. Claimed adversely by Joseph W. Eckhardt, H. E. 07712.

Pursuant, therefore, to departmental instructions of September 2, 1919, in this matter, you will advise the register of the State land office, by copy hereof, that thirty days from notice will be allowed within which to apply for a hearing whereby it may be shown that these lands are nonoil and nongas in character. If such hearing is applied for, you will consult with the chief of field division and fix a time therefor mutually convenient to the Government and the State. You will then proceed to notify each of the above-named homestead entrymen of the contents of this order, advising them that they may appear either in person or by counsel or both and participate in the hearing.

The formal notice to each homestead applicant, if issued by you, will read as follows, description of lands, names and dates to be inserted by you.

"The Commissioner of the General Land Office, in decision dated November , 1919, held that the land embraced in your homestead entry (application) number , viz, (description of land) is shown to be swamp in character by the field notes of survey, upon which the claim of the State of Louisiana was based, and authorized a hearing, on application by the State, for the purpose of determining whether or not the land claimed by you, and other land in said township, is mineral (oil and gas) in character. Application for hearing has been filed and is to be had before (name of officer), at (place), on (date). If the lands are found to be nonmineral in character, they pass to the State under the swamp-land grant (paragraph 7, instructions of October 1, 1903; 32 L. D. 270–278) and your entry (application) must be held for cancellation (rejected), subject to your right of appeal. If mineral in character they do not pass to the State as swamp lands (instructions, May 25, 1918; 46 L. D. 389) and title thereto may be perfected under the homestead or other applicable public-land laws, with reservation to the United States of all oil and gas deposits therein under the provisions of the act of July 17, 1914 (38 Stat. 509). You may appear and participate in the hearing, if you desire, in person or by counsel, or both."

In default of action hereunder by the State within the time limited, its swamp-land claim to the tracts immediately above described will be rejected and said lands will be held and treated as subject to disposition under the applicable public-land laws. Three copies of departmental instructions of September 2, 1919, supra, are enclosed. Forward one copy to the State with your notice hereunder, one copy, together with a copy of this order, to the chief of field division, and retain the third copy for your files.

Very respectfully,

(Signed) CLAY TALLMAN,
Commissioner.

12–29 aw

Plaintiff's Exhibit "B" to complaint.

DEPARTMENT OF THE INTERIOR,
Washington, September 16, 1921.

STATE OF LOUISIANA { "G"
Baton Rouge 655506, 1917.
Swamp-land claim.
Hearing ordered.
Motion denied.

Motion for exercise of supervisory authority.

Counsel on behalf of the State of Louisiana have filed a paper styled "Motion for rehearing" in this matter, which involves the State's swamp-land claim with respect to certain tracts in T. 18 N., R. 14 W., L. M., Baton Rouge land district, Louisiana. This case was considered and adjudicated in departmental decision of July 18, 1921, unreported, the department there stating:

"It is not perceived that any useful purpose would be subserved by allowing time for a formal motion for rehearing. This decision is declared to be final and conclusive and further proceedings will be in harmony with the views above expressed. The record is transmitted to the Commissioner of the General Land Office."

The motion now presented will be treated and disposed of as a motion for the exercise of supervisory power.

The contentions of counsel are substantially the same as those urged upon appeal. Much stress, however, is placed upon the differences between the act of March 2, 1849 (9 Stat. 352), applicable to Louisiana only, and the general swamp-land act of September 28, 1850 (9 Stat. 519), which are pointed out as follows:

1st. The act of 1849 requires no patent, but merely the approval of a list to be made out, by direction of the Secretary, by the surveyor general, or his deputy, whereas the act of 1850 requires a patent to vest the fee-simple title.

2nd. The act of 1849 requires no selection by the State, no patent, nor any request for the approval of the lands, whereas the act of 1850 provides that patent shall issue at the request of the governor of the State.

25 It is urged that the act of 1849 is applicable and controlling, which act contains no mineral reservation or exclusion and requires no patent; that the grant is one in præsenti and attaches as of the date of the granting act upon the identification of the tracts as swamp and overflowed; that the duty is imposed upon the Secretary to approve the lists of such lands certified by the surveyor general; and that, even conceding that mineral lands are excluded from the grant, the tracts here involved inure to the State because returned and identified as swamp by the survey of 1871, and not reported or withdrawn as oil or gas lands until long after the date of the grant and the identification of the tracts as swamp by survey.

To this the department can not assent. True, the acts of 1849 and 1850 differ somewhat in their terms. This difference, however, in the opinion of the department, is not controlling or of great moment. And conceding that the distinction is vital, it would be of no importance in the instant case, because examination discloses that the State's pending selections in T. 18 N., R. 14 W., are practically all embraced in list 93, the claim being asserted under the provisions of the act of 1850. But the soundness of the State's argument is not conceded. The department takes the position that the act of 1849 does not of its own force, any more than the act of 1850, create a present grant of a complete title in the State. As said in the case of State of Louisiana, decided April 12, 1920 (47 L. D. 366, syllabus)—

"Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee-simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity."

In connection with the swamp-land grants the following propositions have been considered by this department and are deemed to have been properly determined:

(1) Mineral lands not being expressly included within the terms of the swamp grant either of 1849 or 1850 do not inure to the State. (2) The interest of the State is inchoate and incomplete until title is vested, and the fee simple title only passes upon approval under the act of 1849 and by patent pursuant to the act of 1850. (3) The authority of the Land Department to inquire into and determine all rights and equities claimed as against the Government does not cease until the legal title has passed. (4) A complete and perfected interest corresponding to full equitable title does not accrue to or vest in the State as to any tract until the same has been finally identified as of the class and condition contemplated by the granting act. (5) The question as to the mineral or nonmineral character of claimed swamp land is open for investigation and adjudication up to and until the time of patent under the act of 1850 and up to the date of the Secretary's approval under the act of 1849.

Nothing presented by counsel persuades the department that the holding on appeal in this case is in error. Upon the records of the Land Department the tracts are impressed with a prima facie mineral character by reason of the subsisting petroleum withdrawal. The State has been accorded due opportunity to show that such is not the character of the lands and that they are, in fact, not mineral bearing, failing in which it was held the swamp-land claim must stand rejected.

26

The conclusions reached in the decision rendered upon appeal herein are adhered to and the present motion is denied.

(Signed) E. C. FINNEY,
First Assistant Secretary.

In the Supreme Court of the District of Columbia.

Rule to show cause.

Filed November 10, 1921.

* * * * * * *

Upon consideration of the bill of complaint herein, and upon application in that behalf made, it is, by the court, this 10th day of November, A. D. 1921, ordered:

That Albert B. Fall, Secretary of the Interior, defendant, show cause to this court, if any he has, on Friday, the second day of December, 1921, at 10 o'clock a. m., why preliminary injunction and restraining order should not issue as prayed in said bill of complaint; provided a copy of said bill and of this rule to show cause be served upon said defendant on or before the 14th day of November, A. D. 1921.

A. A. HOEHLING,
Justice.

Nov. 10, 1921. Service this day accepted.

EDWIN A. BOOTH,
C. E. WRIGHT,
Atty. for Deft.

In the Supreme Court of the District of Columbia.

Motion to dismiss.

Filed December 16, 1921.

* * * * * * *

Comes now the defendant in the above-entitled suit and moves to dismiss the bill of complaint herein filed on the following grounds:

(1) That as appears on the face of the bill the title to the lands involved is still in the United States; that the right of the plaintiff to receive title to said land involves questions of law and certain questions of fact; that the United States is entitled to be heard upon said questions; that any efficient decree that the court could accord plaintiff in this suit would involve a determination of said questions in the absence of the United States as a party; that such decree would adversely affect the interests and rights of the United States as the real and substantial party in interest; that the United States is an indispensable party to this suit, but has not consented in this behalf to be sued.

(2) That the bill on its face shows that there are other parties interested in the subject matter of the suit to whom, it is alleged, the defendant will make disposition of the lands involved unless restrained by order of the court in this suit; that such persons are also indispensable parties defendant to this suit, but have not been made parties hereto.

(3) That if plaintiff be entitled to the land in controversy and if the defendant, unless restrained, disposes of said land to other
27 parties as averred, the plaintiff has a plain, adequate, and usual remedy by suit against said patentees after the administrative functions of the defendant, in respect to said land, have ceased.

(4) That the bill on its face shows that it is an attempt to transfer as by appeal or writ of error the actions and decisions of the defendant to the courts for review; that said actions and decisions involved, on the part of the defendant, the exercise of judgment and discretion in the administration of public land laws of the United States, in respect to a matter within his exclusive jurisdiction to determine and make disposition.

ALBERT B. FALL,
Secretary of the Interior.

By his attorney:
C. EDWARD WRIGHT.

In the Supreme Court of the District of Columbia.

Return to rule to show cause.

Filed December 16, 1921.

* * * * * * *

Comes now the defendant by his attorney and, by way of return to the rule to show cause why temporary injunction should not issue as prayed in the bill of complaint, says that he has filed a motion to dismiss said bill of complaint and prays that the same may be taken as due return to the rule herein issued.

ALBERT B. FALL,
Secretary of the Interior.

By his attorney:
C. EDWARD WRIGHT.

In the Supreme Court of the District of Columbia.

Order overruling motion to dismiss.

Filed March 21, 1922.

* * * * * * *

Ordered, This 21st day of March, 1922, that defendant's motion to dismiss the bill of complaint herein filed be, and the same hereby is, overruled, with leave to the defendant to file answer, if so advised, on or before the 20th day of April, 1922.

By the Court:

A. A. HOEHLING,
Justice.

In the Supreme Court of the District of Columbia.

Decree.

Filed April 5, 1922.

* * * * * * *

This cause having come to be heard upon defendant's motion to dismiss plaintiff's bill of complaint was considered by the court and, by order hereinbefore entered on the 21st day of March, 1922, said motion to dismiss was overruled with leave to defendant further to plead, if so advised, on or before the 20th day of April, 1922.

And now on this 5th day of April, 1922, the defendant, by his attorney, comes into court and elects to stand upon said
28 motion to dismiss and to plead no further. Whereupon, the aforesaid premises being considered by the court, it is, on the day last above written,

Adjudged, ordered, and decreed, that the prayers in said bill of complaint contained be, and are hereby, granted, and that a writ of injunction issue herein directed to the defendant as Secretary of the Interior, his successors in office, and all persons claiming to act under his authority or control, commanding him to vacate, recall, or annul so much of the decisions of the Land Department complained of in the plaintiff's bill of complaint as operates to withhold title from plaintiff for any reason dependent upon alleged mineral character, or requires a hearing whereby it may be shown that the following lands, all situate in T. 18 N., R. 14 W., in the State of Louisiana are nonoil and nongas, or otherwise nonmineral in character, to wit:

Lot 18, sec. 2;
Lots 1 and 2 and NW. ¼ NE. ¼ sec. 3;
Lot 6, sec. 9;
Lots 4, 5, and 6, sec. 10;
Lot 9, sec. 11;
Lots 3, 5, and 6, sec. 14;
Lot 10, sec. 20;
SE. ¼ sec. 21;
NE. ¼ sec. 22;
SE. ¼ sec. 22;
Lot 1, SW. ¼ NW. ¼ and W. ½ sec. 22;
NW. ¼ and S. ½ SW. ¼ sec. 23;
W. ½ NW. ¼ sec. 26;
NW. ¼ sec. 27;
NE. ¼, S. ½ NW. ¼. SE. ¼ and SW. ¼ sec. 28;
SW. ¼ sec. 28;

and further restraining him, and them, from making any disposition of said described lands or from taking any action affecting the same save such immediate steps as are necessary to the further and final recognition of plaintiff's rights under the acts of March 2, 1849 (9

Stat. 352) and September 28, 1850, (9 Stat. 519), to the end that evidence of title may be given to the plaintiff as by said acts provided and required; and that the plaintiff recover of the defendant its costs of suit to be taxed by the clerk and to have execution therefor.

By the Court:

A. A. HOEHLING,
Justice.

And now on this 5th day of April, 1922, the defendant by his attorney in open court notes an appeal from the aforegoing decree to the Court of Appeals of the District of Columbia, and the same is hereby allowed, and pending said appeal it is further ordered that the decree aforesaid be, and the same hereby is, stayed, and no writ shall run thereon against the defendant until further order of the court.

By the Court:

A. A. HOEHLING,
Justice.

O. K. as to form.
C. EDWD. WRIGHT,
Atty. for deft.

29 In the Supreme Court of the District of Columbia.

Assignment of errors.

Filed April 5, 1922.

* * * * * * *

The court erred—

1. In failing to dismiss the bill of complaint for want of jurisdiction on the ground that the United States is a necessary party defendant to the suit and that the action can not be tried in is absence.

2. In failing to dismiss the suit on the ground that the several claimants under homestead entries of the land involved are indispensable parties to the suit but are not joined as defendants.

3. In failing to dismiss the suit on the ground that plaintiff has a plain, usual, and adequate remedy after issuance of patents to others in a suit to charge such patents with a trust.

4. In retaining jurisdiction and holding the Secretary of the Interior to answer when on the face of the bill it is apparent that no decree could be rendered for the plaintiff without reviewing the Secretary in a matter wholly within his jurisdiction and involving the exercise of his judgment and discretion.

5. In failing to hold that legal title not having passed out of the United States the Secretary has exclusive jurisdiction to determine status of land and the respective rights, if any, of the State and the

homestead claimants, and that the courts are without jurisdiction to interfere until legal title passes.

6. In failing to hold that under the swamp land grant of 1849 and 1850 to the plaintiff State lands mineral in character are not within the scope of the grant.

7. In ruling that the Secretary of the Interior had no authority to take the action complained of in the bill.

8. In granting the injunction prayed in the bill and requiring the Secretary to disregard his own construction of the acts of 1849 and 1850 and to substitute therefor the views of the court.

9. In granting an injunction requiring the passing of legal title out of the United States to the plaintiff in face of a record showing that proceedings affecting right to the passing of said title were pending in the Land Department, in which final action had not been taken by the defendant.

C. EDWARD WRIGHT,
Attorney for Defendant.

In the Supreme Court of the District of Columbia.

Designation of record.

Filed April 5, 1922.

* * * * * * *

In making up the transcript of record on appeal in the above-entitled suit the clerk will please to include the following:

1. Bill of complaint and exhibits and rule to show cause.
2. Defendant's motion to dismiss.
3. Defendant's return to the rule.
4. Order overruling motion.
30 5. Decree.
6. Notation of appeal.
7. Assignment of errors.
8. This designation.

C. EDWARD WRIGHT,
Attorney for Defendant.

Supreme Court of the District of Columbia.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 51, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 39570, in equity, wherein State of

Louisiana is plaintiff and Albert B. Fall, Secretary of the Interior, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 19th day of April, A. D. 1922.

[SEAL.] MORGAN H. BEACH,
Clerk.

LMG/EW

(Indorsed on cover:) District of Columbia Supreme Court. No. 3810. Albert B. Fall, Secretary of the Interior, appellant, *vs.* State of Louisiana.

(Stamped on cover:) Court of Appeals, District of Columbia. Filed Apr. 20, 1922. Henry W. Hodges, clerk.

31 In the Court of Appeals of the District of Columbia.

Tuesday, December 12th, A. D. 1922.

* * * * * * *

[Title omitted.]

Argument of case.

The argument in the above-entitled cause was commenced by Mr C. E. Wright, attorney for the appellant.

32 In the Supreme Court of the District of Columbia.

Wednesday, December 13th, A. D. 1922.

* * * * * * *

[Title omitted.]

Argument of cause.

The argument in the above-entitled cause was commenced by Mr. C. E. Wright, attorney for the appellant, and by Mr. F. W. Clements, attorney for appellee, and was concluded by Mr. C. E. Wright, attorney for the appellant. On motion Mr. P. H. Loughran is allowed to file brief herein as amicus curiae.

33 In the Court of Appeals of the District of Columbia.

[Title omitted.]

Opinion.

Before Van Orsdel, Justice, and Martin and Smith, Judges, United States Court of Customs Appeals.

Mr. Justice VAN ORSDEL delivered the opinion of the court:

The Secretary of the Interior of the United States appeals from a decree of the Supreme Court of the District of Columbia, directing that a mandatory injunction issue requiring him to vacate a decision

withholding title from the State of Louisiana to certain swamp and overflowed lands, because of their alleged mineral character; and restraining the Secretary from disposing of the lands, or taking any action affecting the same, excepting such action as may be necessary to the final recognition of the rights of the State to title therein.

It appears that under the act of March 2, 1849, 9 Stats. L., 352, Congress enacted: "That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and
34 overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to the State." The act further provided: "That as soon as the Secretary of the Treasury (afterwards Secretary of the Interior) shall be advised, by the governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of the same to be made out, and certified by the deputies and surveyor-general, to the Secretary of the Treasury (Interior), who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof."

By act of September 28, 1850, 9 Stats. L., 519, Congress made a similar grant to the State of Arkansas of the swamp and overflowed lands therein, providing that the Secretary should "make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor." By a further provision the act was extended to each of the States of the Union in which swamp and overflowed lands may be situated.

35 The lands in controversy were officially surveyed in 1871 and the Commissioner of the General Land Office and the Secretary of the Interior found from the field notes of the survey, as follows: "In conclusion, it is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp or overflowed, and, if nonmineral in character, inure to the State under its grant." This amounted to an approval by the Secretary that they were swamp and overflowed lands, within the provisions of the acts of 1849 and 1850, and would pass to the State, as therein provided, if nonmineral in character.

The Commissioner of the General Land Office in a decision, under date of November 13, 1919, addressed to the Register and Receiver of the Land Office at Baton Rouge, Louisiana, not only found from the field notes of the survey of 1871 that the lands were swamp and overflowed, but instructed the register and receiver, that: "The survey of 1871, having been duly made, approved, and

accepted and being the latest and controlling survey of said T. 18 N., R. 14 W., will be followed in the future, as it has heretofore been in the past, in the adjudication of claims to public lands shown therein." It, therefore, appears that the department has, at all times, recognized the finality of the approval of the survey of 1871, as settling the character of the lands as swamp and overflowed.

This brings us to the chief contention of the Government,
36 that the lands in question are subject to the mineral reservations generally affecting public lands. This is, of course, based upon the assumption that whatever rights Louisiana acrequired were under the grant of 1850, and not of 1849, and that since title under the later act could only pass by patent and, patent not having issued, the title is still in the Government. To sustain this claim it is urged that the title acquired by the State, under the grant, was merely inchoate, and if the land is found to be valuable for mineral, before the perfection of title, it will not vest in the State.

This suggests the proposition whether or not, under the terms of the grant to the State, the question of the mineral or non-mineral character of the lands can be invoked by the Government. The acts of 1849 and 1850 are in terms of present grant. In other words, the grant by the Government to the State of Louisiana was a grant in praesenti. If, therefore, the grant was made under the act of 1849, and not affected by the act of 1850, all that was necessary to confirm the title in the State of Louisiana was the survey of the lands and the approval of the Secretary of the Interior that they were swamp and overflowed in character.

In Louisiana vs. Garfield, 211 U. S. 70, it was urged that the act of 1850 repealed the act of 1849, and that title accordingly
37 would not pass on the mere approval by the Secretary, but by patent as provided in the act of 1850. The court, however, overruling this contention, said: "It is argued that this (act of 1850) so far repealed the special act of 1849 that thereafter the title would not pass on simple approval as provided therein, but a patent was necessary. As we understand, the continuous construction of the department has been to the contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long continued understanding that the special provisions for Louisiana were not affected by a general clause, evidently intended to extend benefits to States that did not enjoy them at the time, not to change the mode of conveyance previously established in a case where the benefit already had been conferred. We may add that we assume that, if approval was sufficient to pass the title, the form of words used by the Secretary of the Interior on December 10, 1895, had that effect, notwithstanding the reference to the act of 1850, whatever may have been his understanding or intent."

The order of December 10, 1895, above referred to, was made with reference to the Fort Sabine Military Reservation, under con-

sideration in the Garfield case, but admittedly coming within the grant of 1849. The order of the Secretary consisted of an indorsement upon a list of these lands that it was "Approved to the
38 State of Louisiana under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850, subject to any valid adverse rights that may exist."

The lands here in question, having been granted to the State in 1849, subject to survey and approval by the Secretary, became vested in fee upon the approval of the survey of 1871. The mere fact that, in the respective departmental orders, an exception was made, respecting the mineral character of the lands, in no way clouds, qualifies, limits, or affects the title of the State, unless the lands so granted were subject to the mineral exemptions from time to time fixed by Congress. No mineral reservation was made in the swamp-land grant of 1849 to Louisiana. This grant was made prior to the establishment by Congress of the policy of reserving the minerals generally in the grants of lands known to be mineral in character. The grant being in praesenti could not be affected by subsequent legislation providing for the reservation of minerals. Nor was the land known to be mineral in character at the time of the grant. It is not clear, therefore, in just what way the subsequent discovery of minerals could affect the title of the State. No reservation of minerals was made in the grant, hence, if the lands had been known to be mineral at that time, the situation would not be different.
39 That no intervening reservation of mineral rights by the Government, in the lands granted to the State of Louisana in 1849 and the approval of the survey as swamp and overflowed lands, can avail against the title of the State, is settled by the decision in Cooper vs. Roberts, 18 How. 173. In that case when the State of Michigan was admitted to the Union, it was granted, for the use of schools, Section Number Sixteen of every township of the public lands within the State. It was held that this was a grant in praesenti and when the lands were subsequently surveyed and marked out, the title thereto in fee simple attached and vested in the State; and that the act of Congress of March 1, 1847, 9 Stats. L., 146, providing for the sale of lands containing "copper, lead, or other valuable ores," did not include the school land section there in controversy; nor could a lease of the minerals made by the Secretary of War, confer any right upon the lessee to enter the land or obtain a patent therefor.

It is settled law, not only in the established practice of the Land Department, but by the decisions of the courts, that the rights acquired under a grant of public lands, not known to be mineral at the time they are surveyed, or at the date of the grant, where the survey precedes it, regardless of the time when the matter becomes a subject of inquiry and decision, are not defeated or affected by a subsequent mineral discovery. United States vs. Morrison,
40 240 U. S. 192; United States vs. Sweet, 245 U. S. 563; Wyoming vs. United States, 255 U. S. 489. Likewise the validity

of the grant or selection relates back to the time when it was made. Payne vs. New Mexico, 255 U. S. 367; Payne vs. Central Pacific Railway Co., 255 U. S. 228.

Objection to jurisdiction is interposed by the Government on the ground that this suit can not be maintained because the United States is an indispensable party. This contention has its basis in the assumption that a patent has not issued to the State as required by the act of 1850, and, therefore, title has not passed from the United States. Inasmuch as we have held that patent is not essential to vesting the fee in the State, but that the fee passed with the approval of the survey of 1871, further consideration of this point is unnecessary.

The decree is affirmed with costs.

41 Court of Appeals of the District of Columbia.

Monday, March 5th, A. D. 1923.

* * * * * *

[Title omitted.]

Decree.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

per Mr. Justice VAN ORSDEL,
March 5, 1923.

Judges James F. Smith and George E. Martin of the United States Court of Customs Appeals sat in this case in the place of Chief Justice Smyth and Justice Robb.

42 Court of Appeals of the District of Columbia.

Tuesday, March 13th, A. D. 1923.

* * * * * *

[Title omitted.]

Order substituting parties appellant.

The retirement of Albert B. Fall and the appointment of Hubert Work, as Secretary of the Interior, having been suggested, it is on motion of Mr. C. E. Wright, attorney for the appellant, Ordered, that Hubert Work, Secretary of the Interior, be and he is hereby made the party appellant herein in place of Albert B. Fall, retired.

43 In the Court of Appeals of the District of Columbia.

January term, 1923.

[Title omitted.]

Motion for rehearing.

Filed March 19, 1923.

Comes now the appellant by his attorneys and moves for a rehearing and reargument in the above entitled cause.

Without regard to the correctness of the court's conclusions generally as to the effect of mineral content upon the swamp-land grant to the State, there are patent in the opinion several statements, which appear to indicate a misunderstanding of certain facts and usages and which, in our opinion, vitally affect the conclusion of the court. It is with a view of correcting such assumptions, if we can successfully point out the errors, that we file this motion.

I.

In the fourth paragraph of the opinion it is stated:

> The lands in controversy were officially surveyed in 1871 and the Commissioner of the General Land Office and the Secretary of the Interior found from the field notes of the survey as follows:

And then is quoted languages taken from the opinion of the Commissioner of the General Land Office dated November 13, 1919. Record, p. 5 at p. 22.

This was the Commissioner's finding, not the Secretary's finding. His name nowhere appears. It is not even alleged in the bill of complaint that the Secretary made this finding. The 6th paragraph of the State's unverified bill of complaint (Note that the record shows that the plaintiff's bill was not sworn to) alleges that the Commissioner, not the Secretary, made this finding and that he required the State to apply for a hearing on the question of mineral character—referring to the decision of November 13, 1919, which the

44 State then and there made its "Exhibit A." Turning to the exhibit, you will see on pp. 23-24, Record, what the commissioner ordered. An appeal was taken from the commissioner's decision by the State—quite naturally an appeal from an adverse order or action; not from any favorable finding. The action adverse to the State was considered by the Secretary. The State in Par. VII of its bill (Record, p. 2) avers that the Secretary, July 18, 1921, "affirmed the action" of the commissioner. The State does not allege that the Secretary affirmed the findings of the Commissioner. Indeed there was reason why it should not: It could not. The Secretary's decision, quoted in full in our Reply Brief, showed that the Secretary passed upon but a single point—the effect of mineral

character upon a swamp-land grant and that he affirmed the decision which ordered the hearing—the adverse action of which the State complained.

True, in Par. 9 of the bill (Record, p. 4), the State in averring that the Secretary's action was in excess of his authority, power, and jurisdiction, introduced that allegation with these words:

> That in ignoring the rights of the State to the lands found by him as a matter of fact to be swamp and overflowed lands and to have been identified as such by the said survey of 1871, etc.

This is not an averment that he had so found. It is a mere introductory recital of an inference the verity of which had not even been previously averred.

We stood on our motion to dismiss advisedly. We understood then, as we understand now, that a motion to dismiss, the new phrase for the old demurrer, admits the truth of only such facts as are well plead; and not matters of inference or argument, however clearly stated. We had the authority of this court in Donaldson v. Wright, 7 App. D. C., 45, 54, to support us. We could have filed an answer affirmatively asserting that the Secretary had never passed upon the swamp character of this particular land. But we were not
45 called upon so to do by any express direct averment in the bill; and, after all, the proof of such an averment, had we made it, would have been found in the Secretary's decision of July 18, 1921, which the court could judicially notice anyway (Santa Fe Pac. Ry. v. Payne, 50 App. D. C., 95, 96), and see for itself.

The intrinsic evidence afforded by the Commissioner's long decision shows that the Secretary had never passed upon the swamp character of this land. Indeed the Com'r's finding, quoted in the opinion of this court, shows that to be the fact; otherwise he would have made no finding but would have referred to a previous finding by his superior, if there had been one, which would have bound him. On the contrary, the whole opinion shows the history of the claim: How a Surveyor General had refused to approve the State's swamp-land list because the survey and field notes of 1838, nearest in point of time to the acts of 1849 and 1850, showed these lands to be covered by lakes; how the State (Record, p. 5) had claimed these "lands" by right of its sovereignty because they were covered by navigable lakes; and how the Commissioner of the General Land Office, September 16, 1904 (Record, p. 13 to p. 17), reversed the Survey General and directed him to make up a list going by the survey and field notes of 1871 and not by the plat of 1838.

It was in this connection that the Commissioner (again, not the Secretary) used the language quoted in the 5th paragraph of the opinion of this court. The Commissioner did not say this in 1919, as evidently the court understands, but the language is quoted from a former Commissioner's decision in 1904; and that in connection with the disregarding of the older survey; i. e., the Surveyor General was to base his list upon the survey and field notes of 1871 rather than

the survey and field notes of 1838, which he had followed because nearest in point of time. But this was not a finding, but a direction to make up a list on which findings ultimately must be made—and made by the Secretary, not the Commissioner alone, before the State benefits.

Now a survey is not approved by the Secretary. Since 1879,
46 surveys have been approved by the Commissioner of the General Land Office. Before that date they were approved merely by the Surveyor General. After April 17, 1879, filing of such plats were not permitted unless and until approved by the Commissioner of the General Land Office. United States v. Morrison, 240 U. S., 192, at p. 210. A survey in itself settles nothing as to the character of land. Field notes, of course, are of evidential value. We quote from Barden v. Northern Pacific Railroad, 154 U. S., 288, at p. 320:

> Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject. In Cole v. Markley, (2 Decisions Dept. of the Interior relating to Public Lands, 847–849,) Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the notations of surveyors, and says: "Public and official information was the object of these notations with a view to preventing entry until the facts are finally determined. They should be, and they are, only prima facie evidence, and subject to be rebutted by satisfactory proof of the real character of the land." The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the Interior. Under their direction and supervision the actual character of the land may be determined and fully established.

And yet in the opinion of this court, it is stated that "the fee passed with the approval of the survey of 1871." This is in reiteration of the holding in the 10th paragraph of the opinion, wherein it is said that—

> The lands here in question, having been granted to the State in *in* 1849, subject to survey andapproval by the Secretary, became vested in fee upon the approval of the survey of 1871.

We respectfully urge that this can not be so because that survey was approved by one no higher than the Surveyor General.

47 On November 13, 1919, the Commissioner found from the field notes of the 1871 survey—that is, from the evidence there afforded—that the lands were swamp. This is a very different thing from the approval of the survey. But under the swamp land grant, something further was required—the finding by the Secretary and his approval, not the Surveyor General's approval or the commissioner's approval, to the State. This approval by the Secretary takes the form of an approval of a list of lands found by him to be swamp to the State, when patent does not issue. That is, there is a specific approval, in lieu of patent, like that mentioned in Louisiana v. Garfield, where the court assumed that the form of the words used would be sufficient.

Nothing of that sort is claimed in this case at all. Nothing of that sort has been done. Something of that sort must be done, if no patent issues. And if it be done in this case, under the duress of a court's decree, it means simply this: That the Secretary, without himself passing upon the character of the land and without exercising his judgment on that subject, must sign a document so holding, even though were he allowed to exercise the judgment Congress reposed in him, he should be of the opinion that the land should be otherwise classified.

So we respectfully submit that the opinion and judgment of this court is clearly erroneous, at least so far as it holds that the fee simple, or any other species of title, passed with the approval of the survey of 1871. This may be due to a lack of full explanation as to the modus operandi in swamp-land cases in the Land Department. Whether or no patent issues, a list is prepared containing the description of surveyed tracts of land which the State claims and the commissioner finds to be swamp land in character, from evidence adducable. Sometimes there are homesteaders (as in this case) who contest the claim that the land is swamp. But regardless of whether there is an appeal from the Commissioner's finding

48 or not, this list must go to the Secretary for his consideration and action, as the Commissioner can not pass title under the swamp-land grant either on his findings or by his recommendation. A "clear list" of these lands goes to the Secretary. If patent is required, the Secretary approves for patent. If no patent is required, then, as in the Louisiana v. Garfield instance, he endorses over his name on this "clear list," "Approved to the State of Louisiana under the act of Congress of March 2, 1849," etc. This con-

stitutes his adjudication. All that the Commissioner does is to recommend. He certifies that the lands are free and clear from adverse claims and that they are swamp according to the evidence before him and recommends the approval of the list.

After the Secretary has so approved the "clear list," it is sent back to the General Land Office into its permanent files. Whereupon the Commissioner delivers to the Governor of the State a certified copy of this approved clear list, and this certified copy performs the office of a patent where patent does not issue; (As a matter of fact, in this case the State's claim is before the Department under the 1850 grant, wherein patent does issue). This certification by the Commissioner of the copy of the recorded original signed by the Secretary as having the office of a patent was authorized by the act of August 3, 1854, 10 Stat. 346. See Weeks v. Bridgman, 159 U. S., 541, at p. 547.

II.

In the final paragraph of the opinion of this court, it is said:

> Objection to jurisdiction is interposed by the Government on the ground that this suit can not be maintained because the United States is an indispensable party. This contention has its basis in the assumption that a patent has not issued to the State as required by the act of 1850, and, therefore, title has not passed from the United States.

We fear we did not make the point very clear to the court. As this case involves a State's list filed under the act of 1850, not 1849 (see our brief, last paragraph on pp. 5 and 6, and next-to-last paragraph on p. 7), our talk was mainly about patent and the status of affairs prior to issue of patent. But in its legal aspects there is no
49 difference between a patent and the certification to the State hereinbefore described. The "certification" is in lieu of the usual patent. Under the act of 1854, it has the same effect. The point in this case is that title has not passed and hence the United States is an indispensable party to the suit. Whether legal title goes on issue of patent or on certification, there is naught but an inchoate title in the State unless and until the Secretary identifies—i. e., signs and approves the clear list by which he "identifies" and adjudicates the land therein listed to be swamp in character. While the State's title is inchoate, the State has no right to be in court litigating its right to complete title unless the United States is party defendant to the suit. That is our point—supported we believe by the authorities cited.

Not alone on this point but on the aspects of the case in its "present grant" feature, we quote from Little v. Williams, 231 U. S., 335, at p. 339:

> Although the terms of the first section of the act denote a present grant to the State of the "swamp and overflowed lands, made unfit thereby for cultivation," the second section lays upon the Secretary of the Interior the duty of identifying and listing

the lands coming within the terms of the grant and of causing patents therefor to be issued to the State "at the request of" its Governor, and then declares: "and on that patent the fee simple to said lands shall vest in the said State," subject to the disposal of its legislature. It became necessary, in Rogers Locomotive Works v. Emigrant Company, 164 U. S. 559, to determine the meaning and effect of the act in the light of these provisions and of prior decisions, and it was there said (p. 570): "While, therefore, as held in many cases, the act of 1850 was in praesenti, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act." And again (p. 574): "It belonged to him (the Secretary of the Interior), primarily, to identify all lands that were to go to the State under the act of 1850. When he made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued." What was there said has since been regarded as the settled law upon the subject. Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592; Brown v. Hitchcock, 173 U. S. 473, 476; Niles v. Cedar Point Club, 175 U. S. 300, 308; Ogden v. Buckley, 116 Iowa, 352; Birch v. Gillis, 67 Missouri, 102; Carr v. Moore, 119 Iowa, 152, 159.

As this land was never so identified, and, so far as appears, its identification was never even requested by the State, it follows that, even if at the date of the act the land was in fact swamp or overflowed, the State never acquired more than an inchoate title to it, a claim which was imperfect both at law and in equity.

50 If the court will read into this excerpt "certification" wherever the word "patent" occurs, our contention will be perceived.

We assume that the court did not overlook the fact that Cooper v. Roberts, so far as it has any bearing upon this case, stands condemned by United States v. Sweet, 245 U. S. 563, 573. We press no further argument on the question of mineral character, however. That is a matter susceptible of wide difference in opinion. But we do think we have pointed out manifest errors in the opinion which the court will desire to correct while the case is still within its jurisdiction. And whatever may be the outcome, it is manifest that this case will go to the Supreme Court on the appeal of the losing party. At least, if this motion should be denied, it is our intention to ask the allowance of an appeal.

For this reason, we pray that mandate may be stayed until further order of the court.

But we earnestly urge that the court grant our motion to rehear this case, which we file in the firm conviction that its points are well taken.

EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

51 [File endorsement omitted.]

52 In the Court of Appeals of the District of Columbia.
Friday, March 23rd, A. D. 1923.

* * * * * * *

[Title omitted.]

Order denying rehearing and staying mandate.

On consideration of the motion for a rehearing and stay of mandate in the above entitled cause, it is ordered that a rehearing be overruled and that the mandate be stayed until further order.

53 In the Court of Appeals of the District of Columbia.

January term, 1923.

[Title omitted.]

Petition for allowance of appeal.

Filed Apr. 4, 1923.

Now comes Hubert Work, Secretary of the Interior, appellant in the above entitled cause, and respectfully shows that on or about the 5th day of March, 1923, this court entered a judgment herein in favor of the appellee and against the appellant, affirming the decree of the Supreme Court of the District of Columbia in favor of appellee, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellant, some of which was brought to the court's attention by the appellant's motion for rehearing denied by this court on the 23d of March, 1923, and all of which will appear more in detail from the assignment of errors filed with this petition.

The appellant further shows that the judgment of the Court of Appeals of the District of Columbia in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 5 of section 250 of the Judicial Code, in that the validity of an authority exercised by the appellant under the United States as Secretary of the Interior, and the scope of power exercised by him as such Secretary of the Interior were drawn in question.

The appellant further shows that the judgment of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said section 250 of the Judi-

cial Code, in that the construction of acts of Congress, to wit,
54 the act of March 2, 1849 (9 Stat., 352), and the act of September 28, 1850 (9 Stat., 519), was drawn in question by the appellant, who was the defendant below, who asserted and relied upon a construction of said statutes contrary to that placed thereon by the Court of Appeals in its judgment herein.

Wherefore appellant prays that an appeal may be allowed to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, and that the mandate of this court be stayed until further order.

HUBERT WORK,
Secretary of the Interior.

By his attorneys:

EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

55 In the Court of Appeals of the District of Columbia.

January term, 1923.

[Title omitted.]

Assignment of errors.

Filed April 4, 1923.

And now comes the appellant by his attorneys and says that in the record and proceedings of the Court of Appeals in the above-entitled cause, and in the rendition of the final judgment herein, manifest error has intervened to the prejudice of said appellant, in this, to wit:

1. That the court erred in affirming the decree below.
2. That the court erred in reviewing the appellant in his construction of a statute devolving upon him to administer.
3. That the court erred in deciding and holding that the United States was not an indispensable party to the suit.
4. That the court erred in failing to hold that this is in effect a suit against the United States.
5. That the court erred in failing to hold that the homestead settlers were indispensable parties to the suit.
6. That the court erred in failing to hold that the Secretary had yet jurisdiction in the subject matter of the suit and authority to require the hearing ordered by the Commissioner of the General Land Office herein.
7. That the court erred in failing to hold that appellant had not passed upon the swamp-land character of the land in controversy.

8. That the court erred in holding that the fee title to the land in controversy passed to the State of Louisiana with the approval of the survey of 1871.

56 9. That the court erred in failing to hold that under the acts of March 2, 1849, and August 3, 1854, certification of a clear-list approved by the Secretary of the Interior is necessary to pass title to the State under its swamp-land grant, and that until that is done, the State's title is merely inchoate.

10. That the court erred in holding, in effect, that the State takes title to swamp or overflowed lands even if such lands be mineral in character.

Wherefore the appellant prays that for the errors aforesaid and other errors appearing in the record of the said Court of Appeals in said cause, to the prejudice of the appellant, the judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that the said cause be remanded to the said Court of Appeals with instructions to reverse the decree of the Supreme Court of the District of Columbia in said cause rendered, or for such further proceedings in said cause as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

HUBERT WORK,
Secretary of the Interior.

By his attorneys:

EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

57 [File endorsement omitted.]

58 In the Court of Appeals of the District of Columbia.

Saturday, April 7th, A. D. 1923.

* * * * * * *

[Title omitted.]

Order allowing appeal.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above-entitled cause, it is ordered that said appeal be and the same is hereby allowed as prayed.

59 [Citation in usual form showing service on F. W. Clements, filed April 10, 1923. Omitted in printing.]

60 [File endorsement omitted]

61 In the Court of Appeals of the District of Columbia.

[Title omitted.]

Designation.

Filed April 9, 1923.

In addition to the matters usually included in the transcript of record on appeal the clerk will please to include in his preparation of said transcript appellant's motion for rehearing herein filed with notation of the court's action thereon.

C. EDW. WRIGHT,
Attorney for Appellant.

[File endorsement omitted.]

62 Court of Appeals of the District of Columbia.

Clerk's certificate.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 61, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Hubert Work, Secretary of the Interior, Appellant, vs. State of Louisiana, No. 3810, April Term, 1923, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of April, A. D. 1923.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsed:) File No. 29,543. District of Columbia, Court of Appeals. Term No. 289. Hubert Work, Secretary of the Interior, Appellant, vs. State of Louisiana. Filed April 13th, 1923. File No. 29,543.

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In the Supreme Court of the United States

OCTOBER TERM, 1923

HUBERT WORK, SECRETARY OF THE INTERIOR, Appellant,
v.
STATE OF LOUISIANA
No. 289

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT

By a bill filed in the Supreme Court of the District of Columbia, the State of Louisiana sought an injunction restraining the Secretary of the Interior from enforcing an order or ruling directing a hearing to determine the mineral character of lands claimed by the State to be swamp or overflowed and inuring to it under certain acts of Congress. A mandatory injunction was also sought, commanding the Secretary to vacate this order or ruling and to recognize and give full legal force and effect to the State's rights under those acts. (R. 1–5.)

THE FACTS

The claim of the State is asserted under two statutes. The first is the Act of March 2, 1849, c. 87, 9 Stat. 352, section 1 of which reads:

> That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.

Section 2 provided that upon being advised by the Governor that the State had made the necessary preparation to defray the expenses thereof, the Secretary of the Treasury (now Interior) should cause a personal examination to be made, under the direction of the surveyor general, by experienced and faithful deputies, of all the swamp lands which are subject to overflow and unfit for cultivation; and a list of the same to be made out and certified by the deputies and surveyor general, to the Secretary, who "shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana."

The other act under which claim is asserted is that of September 28, 1850, c. 84, 9 Stat. 519. It made a similar grant to the State of Arkansas and by section 4 extended its provisions and benefits to each of the other States of the Union in which such swamp and overflowed lands might be situated.

Section 2 of this act made it the duty of the Secretary of the Interior, as soon as practicable, to make out an accurate list and plats of the lands and transmit the same to the Governor, and at his request, cause a patent to be issued to the State and "on that patent, the fee simple to said lands shall vest in the said State * * *."

The lands involved in the suit are in Township 18 North, Range 12 West. They were shown on the plat of survey of 1838 as Cross Bayou, and Cross and Soda Lakes returned as navigable lakes, but by the field notes of a survey made in 1871 they are shown as swamp and overflowed lands. The public lands in this township were on December 15, 1908, withdrawn from settlement, entry, or other forms of appropriation, in aid of proposed legislation, and on July 2, 1910, by executive order, included in petroleum reserve No. 4.

The history of the adjudications of the claims of the State to lands in this township, which it asserted were swamp and overflowed, is detailed in the letter of the Commissioner of the General Land Office, dated November 13, 1919, which is Exhibit "A" to the bill of complaint. (R. 5–25.) It shows that the first claim of the State was predicated upon the survey of 1838, but after the survey of 1871 that survey was relied upon in future selections or listings.

Various adjudications were made at different dates as set forth in the Commissioner's letter resulting in partial approval and partial rejection of the several selections or listings. The *particular*

lands involved in this suit (with the exception of certain tracts in section 23) were presented for consideration by a communication dated April 24, 1901, to the Surveyor-General for Louisiana, from the Register of the State Land Office, wherein he requested that these tracts be listed and approved to the State as swamp lands. After intermediate proceedings, the Surveyor-General, in accordance with instructions of the Commissioner of the General Land Office, made up a revised list. (R. 18.) This was passed upon by the Commissioner as set forth at R. 19–24. It was found that several of the tracts had already been adjudicated or otherwise disposed of, and that as to the balance nearly all were embraced in homestead applications or entries allowed during the period 1915 to 1919.

In his letter of November 13, 1919, the Commissioner, after a full review of all the proceedings had on the claims of the State to lands in this township, found as follows (R. 24):

> It is found from the field notes of the survey of 1871 that the lands hereinafter described [the lands involved in this suit] are swamp or overflowed, and, if nonmineral in character, inure to the State under its grant, and may be patented pursuant thereto when the record has been cleared of adverse claims.

In view of the withdrawal of these lands as petroleum, the Commissioner then ordered the Register and Receiver at Baton Rouge to advise the Register of the State Land Office that thirty days

would be allowed within which a hearing might be applied for wherein "it may be shown that these lands are nonoil and nongas in character." (R. 25.) It was stated that in default of action by the State within the time limited, its swamp-land claim to these tracts would be rejected and the lands held and treated as subject to disposition under the applicable public land laws. (R. 25.)

Notice of the hearing was ordered to be given to the several homestead claimants and they were apprised that they might appear and participate in the hearing. (R. 25.)

From this order for such a hearing the State appealed to the Secretary of the Interior, who affirmed the order. His decision is set out as an appendix to this brief. A motion for the exercise of supervisory power was considered and denied (R. 26–27), whereupon the bill for injunction was filed.

The theory of the bill appears to be that the two acts making swamp-land grants were grants *in praesenti;* that mineral lands were not excepted from the grant of swamp lands, and that if so excepted the determination as to mineral character must relate to the date of the grant or the time of the approval of the plat of survey identifying the lands. (Par. IX, Bill of Complaint, R. 3.)

A motion to dismiss the bill was interposed by the Secretary of the Interior upon the grounds (1) that the suit was in substance one against the United States; (2) that there were other parties interested in the disposition of the lands who were indispensable

parties; (3) that the State had an adequate remedy at law after the United States had disposed of the lands; and (4) that the decision complained of was made by the Secretary in the exercise of judgment and discretion in a matter within his jurisdiction and hence not reviewable by the courts. (R. 28, 29.)

This motion was overruled (R. 29), and defendant electing to stand thereon a decree was entered awarding an injunction commanding the Secretary to vacate, recall, and annul so much of the decisions of the Land Department as operate to withhold title from the State for any reason dependent upon alleged mineral character or requiring a hearing on that question. The Secretary was further enjoined from making any disposition of the lands or from taking action affecting the same, save such immediate steps as are necessary to the final recognition of the State's rights under the Acts of March 2, 1849, and September 28, 1850, to the end that evidence of title may be given the State. (R. 30, 31.)

An appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree. (R. 37.) The opinion is on pp. 33-37 of the Record; 287 Fed. 999. A motion for rehearing was filed (R. 38–43) and denied (R. 44). The further appeal of the Secretary brings the case to this court.

ASSIGNMENT OF ERRORS

The assignment of errors (R. 45, 46) questions the correctness of the judgment of the Court of Appeals in the following particulars:

a. In reviewing the Secretary's construction of a statute which he was required to administer.

b. In holding and deciding that the United States was not a necessary party, and that the suit was not in effect a suit against it.

c. In failing to hold the homestead claimants to be indispensable parties to the suit.

d. In failing to hold that the Secretary of the Interior had jurisdiction to determine the character of the lands claimed by the State and in holding that the title to the lands had vested in the State with the approval of the 1871 survey.

e. In deciding that mineral lands are not excepted from the swamp-land grants.

Under these assignments we present the following propositions:

I. Mineral lands do not pass under the swamp-land grants but are excepted therefrom.

II. The Secretary of the Interior has jurisdiction to determine the character of the lands and the order for a hearing for that purpose being interlocutory in character, this suit is premature.

III. The suit is one against the United States.

IV. The homesteaders are indispensable parties.

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ARGUMENT

I

Mineral lands do not pass under the swamp-land grants but are excepted therefrom

The Court of Appeals very flatly held that the State of Louisiana is entitled to these lands regardless of their mineral character. It said (R. 36):

> No mineral reservation was made in the swamp-land grant of 1849 to Louisiana. This grant was made prior to the establishment by Congress of the policy of reserving the minerals generally in the grants of lands known to be mineral in character.

The decree of the Supreme Court of the District of Columbia proceeded upon the same theory.

In the light of the decision of this court in *United States* v. *Gratiot*, 14 Pet. 526, it is impossible to justify the view taken by the courts below. There it was said (p. 537):

> It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States.

If that policy was of long standing and well established in 1840, when that case was decided, much more was it well established in 1849 when the grant of swamp lands was made to Louisiana. True, there was no express exception of minerals in the Act of 1849, but that is not controlling or determinative. Neither was there express exception in the grant of "school sections" to the State of Utah in its enabling

act. Yet this court held that that act must be interpreted in the light of the established policy and in effect read into the grant such an exception. *United States* v. *Sweet*, 245 U. S. 563. The decision in that case so effectually disposes of the question and so thoroughly reviews the authorities as to render further discussion unnecessary.

II

The Secretary of the Interior has jurisdiction to determine the character of the lands, and the order for a hearing for that purpose being interlocutory in character, this suit is premature

It seems clear from the bill of complaint that the State of Louisiana is not basing its claim to these lands solely upon the Act of March 2, 1849, but is relying as well upon the Act of September 28, 1850. But whether it relies upon the Act of 1849 or that of 1850 is immaterial on the question of the jurisdiction of the Secretary to order a hearing.

Under the 1849 Act, there must be an approval by the Secretary of the Interior of lands listed as swamp and overflowed. Under the 1850 Act, a patent must issue. In the one case the statute declares that "upon that *approval*, the fee simple to said lands shall vest in the said State of Louisiana"; in the other, "on that patent, the fee simple to said lands shall vest * * *."

Now it is not disputed that no *patent* has issued for these lands, so that if the claim is asserted under the 1850 Act, the title is yet in the United States.

Equally clear is it that no *approval*, as required under the 1849 Act, has been given.

It is a fact that the *Commissioner of the General Land Office*, in his decision of November 13, 1919, found, from the field notes of the Survey of 1871, the lands to be swamp or overflowed, but the *Secretary has not so found*. In this respect the Court of Appeals fell into error, for it distinctly said (R. 34) that both the Commissioner *and* the Secretary so found. The record is to the contrary. The decision of the Secretary was on the appeal of the State from the order of the Commissioner directing a hearing as to the mineral character. The Secretary was not called upon to pass upon the question of whether the lands were swamp or overflowed and properly subject to the claim of the State, nor did he do so. It would be going a long way to construe into an approval of the list his action in affirming the order for a hearing. Moreover, that is not the procedure by which approval is given. The practice is to have a list of lands made up in the General Land Office, embracing tracts selected and which have been found subject to the grant; this "clear list" is forwarded by the Commissioner to the Secretary for approval; the latter's approval is endorsed thereon and that is the "approval" upon which the fee simple vests in the State.

Now, if no approval has been given nor patent issued, the power of the Secretary to inquire into the extent and validity of the rights claimed against the government by the State with respect to these

lands, still continues. It does not cease until the *legal* title passes. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593; *Lane* v. *Mickadiet*, 241 U. S. 201; *Cameron* v. *United States*, 252 U. S. 450, 460, 461.

The question of the character of the land was one for the Land Department. *Cameron* v. *United States, supra*, p. 461, 462.

The legal title to these lands being still in the United States, and there being jurisdiction in the Land Department to inquire into their character, the courts are without power to intervene while the grant is in process of administration; the matter is still *in fieri* in the Land Department. *Minnesota* v. *Lane*, 247 U. S. 243; *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Plested* v. *Abbey*, 228 U. S. 42, 51; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 392.

Oregon v. *Hitchcock*, 202 U. S. 60, is very much in point. The State sought an injunction against the Secretary of the Interior to restrain him from allotting or patenting to Indians or others, lands within the Klamath Indian Reservation, to which it claimed to be entitled under its swamp grant. It also sought a decree establishing its title to these lands. It appeared that the State had made application for the lands as swamp and overflowed, but that its application had been rejected "upon the sole ground that the lands, whether swamp and overflowed or not, were not granted to the State. * * *" This court held that the suit was one against the United States and not maintainable for

that reason, but also held that the grant was in process of administration and hence that the court could not interfere. Particularly pertinent is the statement (p. 70):

> There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860.

If the court in that case could not interfere when the State application had been *rejected* without an adjudication by the Secretary of the swamp character of the land, much less can it interfere in this case where the Secretary, without rejecting the application, has not yet passed upon that question.

It is important to bear in mind that no definite, final action has been taken by the Secretary adverse to the State. What the State is complaining of is an order for a hearing to determine the character of the land; what it seeks to restrain is the execution of that order, the holding of a hearing. There has been no rejection of the State's claim, nor can it be said that there ever will be. The decision on the question of the mineral character of the land may be such as will enable the State to secure the lands. Surely while the question of the right of the State is being adjudicated by the Land Department and in the absence of a final rejection of the State's claim, action by the courts is premature, *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308; *Lane* v. *Mickadiet, supra; United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82; *Cameron* v. *Weedin*, 226 Fed. 44.

In this respect the case at bar is easily distinguishable from *Payne* v. *Central Pac. Ry.*, 255 U. S. 228, and *Payne* v. *New Mexico*, id. 367, for in each of these cases the Secretary had decided that a tendered selection should be cancelled or rejected. Here the order is interlocutory only.

If there be jurisdiction in the Secretary to determine the character of the lands, the possibility that he may err in his judgment is not sufficient to warrant action by the court. Jurisdiction is the power to decide, not merely the power to decide correctly. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305–308.

The Court of Appeals labored under the misapprehension that the *approval of the survey* of 1871 had the effect of vesting full title in the State. There is no support for such a view.

It is settled law that while the swamp land grant was a grant *in præsenti* and gave an inchoate title, yet the lands need to be identified as lands that pass under the act. It belongs to the Secretary of the Interior to make this identification, and until that is done the State's title is not perfected. *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land and Lumber Co.* v. *Rust*, *supra*; *Sawyer* v. *Osterhaus*, 212 Fed. 765.

Even if at the date of the act the land was in fact swamp or overflowed, yet unless it was identified as such by the Secretary of the Interior, the State never acquired more than an inchoate title to it, a claim which is imperfect both at law and in equity. *Little*

v. *Williams*, 231 U. S. 335, 340; *Chapman & Dewey* v. *St. Francis Levee Dist.*, 232 U. S. 186, 198. No mere claim that lands are swamp and overflowed can make them such, unless it is sustained by competent authority to that effect. *United States* v. *C. M. & St. P. Ry. Co.*, 218 U. S. 233. It is therefore apparent that the approval of a survey is not the "identification" referred to in the decisions, which is to be followed by "approval." Moreover, the Secretary does not approve a survey; that is a function of the Commissioner of the General Land Office. *United States* v. *Morrison*, 240 U. S. 192, 210.

There having been no identification of these lands as swamp and overflowed, no title has become perfected in the State of Louisiana; its title is still inchoate and the Land Department retains full right to adjudicate the claim. This right to inquire as to the mineral character of the land would exist even if *equitable* title had vested, for while the *legal* title remains in the United States, all inquiry as to rights asserted are cognizable in the Land Department.

We could properly close the discussion upon this point here, for the enjoining of the Secretary from proceeding to a hearing upon a matter within his jurisdiction—indeed solely within his jurisdiction—and while the matter is still in process of administration before him, is an unwarranted interference with his functions.

However, the State has raised a further question, and that is as to the scope of the inquiry as to the mineral character of the lands—the time to which the

hearing must relate. The State's position is that the character of the lands must be determined as of the date of the granting acts (1849 or 1850) or at the latest, the date of the second survey (1871). The order for hearing does not specify the date to which the hearing shall be directed. But in view of the decisions of the Secretary it is evident that he regards the question open as of the present time, inasmuch as it is held that equitable title has not vested since no identification of the lands as swamp and overflowed has been made by him.

The rule applicable to railroad grants, which, like the swamp grants, are grants *in praesenti*, is that the mineral character can be determined as of any date up to issuance of patent. *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288.

The rule applicable to grants to States for school, educational, and other purposes is that the known character of the lands when the right of the State attaches, governs; which, as to specific sections, is the date of the granting act if surveyed or at survey, if unsurveyed; and, as to other lands at the date when, under the applicable law, equitable title vests in the State. *United States* v. *Sweet*, *supra*; *Payne* v. *New Mexico*, 255 U. S. 367, 370, 371; *Wyoming* v. *United States*, 255 U. S. 489, 500. If the rule of the *Barden case* is applicable to swamp grants, clearly the question of whether these lands are *now* known to be mineral is properly within the scope of the hearing which has been ordered.

The rule applicable to grants to the states of lands in place for school purposes cannot properly be applied to swamp grants, for the specified sections granted are identified by the survey and nothing further is necessary to give definiteness and yet, even under this grant, it is within the power of the executive to make other disposition of the lands, even though surveyed, if the survey has not been approved by the Commissioner of the General Land Office. *United States* v. *Morrison, supra.* As to swamp lands, the survey does not identify them as such; it does not make them swamp or overflowed.

We think that, assuming the rule as to railroad grants inapplicable, the proper one is that stated by the Secretary, namely, the question of the mineral character is open and to be determined as of the time when the *equitable title* vests. In determining when the equitable title vests it is important to note that under the act of 1849, the State is required to defray the expenses of an *examination* of the lands, which is to be made under the direction of the Secretary, by deputy surveyors; a *list* of the swamp lands is to be made out and certified by the deputies and the surveyor general to the Secretary for his approval. Under the Act of 1850, the Secretary is to make out a list of the lands, transmit it to the Governor of the State, and at the request of the Governor, cause a patent to be issued.

Both statutes are clear in pointing out the Secretary as the one to ultimately determine the character of the lands, and the action which he takes

is entirely distinct from the identification of the lands by the survey. Otherwise, if the lands were surveyed when the grants were made, there would be no judicial function necessary on his part.

The approval which, under the 1849 Act, the Secretary is to give the list, is but the evidence of a previous determination by him that the lands are subject to the grant. The same would be true of his action under the 1850 Act.

Here we may call attention to the fact that the Supreme Court of Louisiana has construed the swamp acts as requiring a listing or selection of the land as a prerequisite. *McDade* v. *Bossier Levee Board*, 109 La. 625; *Hartigan* v. *Weaver*, 126 La. 492; *Elms* v. *Elliott*, 129 La. 978. In *Vicksburg, etc., R. Co.* v. *Tibbs*, 112 La. 51, the contention was made that, without regard to selection or approval, land of the requisite character was acquired under the swamp grants. The court said (p. 59):

> The Acts of 1849 and 1850 (9 Stat. 352, 519) were clearly not intended to operate against the will of the State. Upon the contrary, they distinctly left it to the State to select, subject to the approval of the Secretary of the interior, the lands which it might consider within the terms of the grant. Whether the State might have selected the tract in question, and *whether such selection might or would have been approved*, need not be here considered.

These Louisiana cases are also noteworthy as showing that both the Acts of 1849 and of 1850 were considered applicable to the State, and no distinction was made as to rights thereunder.

The Court of Appeals confused the identification of the lands by the survey with the identification required by the Secretary of the lands as subject to the grants. Referring to the statement of the Commissioner in his letter of November 13, 1919, that the survey of 1871 would be followed in the *adjudication* of claims, it said (R. 35):

> It therefore appears that the department has, at all times, recognized the finality of the approval of the survey of 1871, as settling the character of the lands as swamp and overflowed.

And (R. 37) that the fee passed with the approval of the survey of 1871.

Perhaps the court reached this conclusion partly from the ruling of the Secretary in *State of Louisiana*, 32 L. D. 270, 276, wherein it was decided that "all future selections under said grants will be disposed of according to the showing evidenced by the field notes of survey alone." But, however arrived at, the conclusion reached totally ignores the plain provisions of the acts. *Lists* are to be made up and either approved or patents thereon issued. Yet, under the view of the Court of Appeals, all this is unnecessary, for title has already passed by the approval of the survey, hence, at most, the Secretary's action is purely ministerial.

This is but a variation of the contention made to, but rejected by, this court in *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 232 U. S. 186, 198, and *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31, that although not selected, lands passed to the State because they were of the character eligible to pass under the grant. The logic of that would be that the Secretary made his finding that the lands were of the character subject to the acts before he knew what or where they were. Furthermore, in approving a survey, the Commissioner of the General Land Office passes only upon the technical sufficiency of it as an engineering proposition, and its conformity to the statutory requirements and the regulations of the department.

Now, as has already been pointed out, the Secretary has as yet made no determination as to the swamp character of the lands. Hence, as said in *Little* v. *Williams, supra*, as the land was never identified, it follows that, even if at the date of the act the land was in fact swamp or overflowed, the State never acquired more than an inchoate title to it—a claim which was imperfect both at law and in equity. Therefore, as the equitable title has not vested, the question of the known character of the land in so far as minerals are concerned, may be determined as of the present time.

III

The suit is one against the United States

The effect of the decree below is to divest the United States of title to these lands, for under it the

Secretary may do nothing with respect to them save to take "such immediate steps as are necessary to the further and final recognition of plaintiff's rights * * * to the end that evidence of title may be given to the plaintiff * * *."

Thus, without an opportunity for the United States, the title holder, to be heard, the title to the lands is adjudicated. Certainly this is trying its title "behind its back," which this court declared in *Louisiana* v. *Garfield*, 211 U. S. 70, could not be done. Singularly enough, that case involved a claim of Louisiana under this same act and practically the same contention as to title or right to the land there involved was asserted as is asserted here. In that case there had been an approval of lands to the State of Louisiana under the Swamp Act of 1849; this was vacated by a succeeding Secretary and directions given for disposal of the lands as provided by law, on the ground that they were not subject to the Swamp Act, since, at the date of that act, they were within a military reservation. It was asserted by Louisiana that upon the approval given by the Secretary to the swamp claim, the title to the land passed. The court said that even assuming that the United States clearly had no title to the land in controversy, the bill could not be maintained because the approval proceeded upon a mistake of law. The only doubt was whether the statute of limitations barring suits to vacate patents after five years was applicable and confirmed the title though the

approval was void. As to that the court said (p. 77):

> But that doubt can not be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

It will be perceived that that case was stronger than the case at bar, for here there has been no approval.

Oregon v. *Hitchcock*, 202 U. S. 60, is likewise in point. There, selection made by Oregon of lands which it claimed under its swamp grant had been rejected on the ground that regardless of whether the lands were swamp and overflowed, they were not granted to the State by the act. It was held that the suit was one against the United States and

could not be maintained. To the same effect are *Naganab* v. *Hitchcock*, 202 U. S. 473; *New Mexico* v. *Lane*, 243 U. S. 52. The case of *Payne* v. *Central Pacific Railway Co.*, 255 U. S. 228, is not in conflict. In that case an indemnity selection list filed by the railway company was conceded to be regular and of lands subject to selection. The only objection to its approval was that after all requirements had been met by the company the lands had been included in a power site withdrawal and the Secretary had directed the cancellation of the filing on that ground. It was argued that as the Act required an approval by the Secretary, which had not been given, the equitable title had not vested. It was held that the equitable title had vested and that there remained a mere ministerial duty on the part of the Secretary. It is important to note, however, that in considering what was implied in the requirement for approval, the court said (p. 236):

> Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and *that the lands selected are such as are subject to selection.* [Italics supplied.]

In the instant case the Secretary is exercising a judicial function, one devolving upon him under the law, to determine the character of the land, whether,

in the language of *Payne* v. *Central Pac. Ry. Co.*, "the lands selected are such as are subject to selection." Yet the decree appealed from requires him to desist from doing this very thing.

While he is discharging the duty imposed upon him and exercising a function of that character, he cannot be subjected to the restraint of the courts. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343.

IV

The Homesteaders are Indispensable Parties

Nearly all the tracts involved in the state's claim are covered by homestead applications or entries, as specified in Exhibit "A" at R. 24. Most of these have been allowed subject to the swamp land claim. This suit by the state ignores the inchoate rights of these homesteaders and seeks a vesting of the title to the lands in the state without any opportunity for them to be heard. We think that under decisions of *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578; *New Mexico* v. *Lane*, 243 U. S. 52, 58, and *Brady* v. *Work*, 263 U. S. 435, the homesteaders are necessary parties and the suit cannot proceed in their absence.

Their situation is not unlike that of the pre-emptioners considered in the *Litchfield* case. The plaintiff there asserted, as does Louisiana here, that he had *legal title* to the lands and sought to restrain the land officials from entertaining applications of

preemption claimants in support of their right to the lands. It was said (p. 578):

> These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without possibility of a hearing on the part of the party interested.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals was erroneous and should be reversed and the cause remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

APRIL, 1924.

APPENDIX

DEPARTMENT OF THE INTERIOR,
Washington, July 18, 1921.

D. 38573.

State of Louisiana.
"G."
Baton Rouge 855508.
Baton Rouge swamp-land claims.
Hearing ordered.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

The State of Louisiana, claiming under the swamp-land grant certain described lands in township 18 N., R. 14 W., La. M., Baton Rouge land district, has appealed from the decision of the Commissioner of the General Land Office, dated November 13, 1919, in which the State was advised that it would be allowed 30 days within which to apply for a hearing whereby it might be shown that the lands were nonoil and nongas in character. The State was further advised that in the event of default its swamp-land claim to the tracts would be rejected and said lands would be held and treated as subject to disposition under the applicable public-land laws.

In his decision the commissioner said:

> In conclusion: It is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp or overflowed, and if nonmineral in character inure

> to the State under its grant and may be patented pursuant thereto when the record has been cleared of adverse claims.

Following the above excerpt the commissioner described certain tracts and noted where adverse filings or claims had been presented for the same.

Counsel on behalf of the State broadly contend in support of the appeal that the swamp-land acts constituted a present grant without restriction or reservation as to minerals. In their printed brief appears the following:

> The appeal is based upon the ground that with the determination of the question as to the swampy or nonswampy character of the lands the jurisdiction of the Land Department is at an end, save and except for the performance of the ministerial duty of passing to the State the evidence of the title inuring upon the determination of the swampy character of the lands.
>
> * * * * *
>
> Under the fact finding of the commissioner, therefore, it is respectfully submitted that his legal conclusions are erroneous—
>
> First. The swamp-land act constituting a present grant of all overflowed lands without restriction or reservation as to mineral lands, no such exception can now be written into the grant;
>
> Second. If it should be held that an exception of mineral lands could be read into the swamp-land grant to Louisiana, the department would have no right to refuse its approval to the State to lands which were not in 1849 *known* to be mineral lands; and
>
> Third. As before pointed out, the granting act lays the burden upon the Land Department to cause an examination to be made of the lands, and likewise the duty of causing a

> list of the lands falling within the purview of the grant to be made out, upon which the act provides the Secretary "shall approve the same" as evidence of fee-simple title.

By departmental order of December 15, 1908, the public lands in the above township, and in many others, were withdrawn from settlement and entry, or other form of appropriation, to conserve the public interests and in aid of such legislation as might thereafter be proposed or recommended. By presidential order of July 2, 1910, the above withdrawal was ratified, confirmed, and continued in full force and effect; and subject to all the provisions of the withdrawal act of June 25, 1910 (36 Stat. 847), the lands were withdrawn in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States and included in petroleum reserve No. 4. The township has been reported as lying in the oil and gas bearing region of Louisiana. This department is advised that drilling has demonstrated the mineral value of a part of the township, while the remainder is undeveloped; that in January, 1918, the Bio Gas & Oil Co. completed a 6,000,000 cubic foot gas well in section 27 in the old bed of Cross Lake, and that in the northern portion of the township to the south other large gas wells have been brought in, one with a reported capacity of 12,000,000 cubic feet. It may well be that the State's earnest contentions in support of this appeal are induced as much by its inability to show the nonmineral character of the land as by confidence and belief in the soundness of its argument.

The questions suggested are hardly matters now open to disputation before this department.

In its instructions of May 25, 1918 (46 L. D. 389), the department concluded that until patent

issued the State's swamp claim was incomplete and inchoate, and the mineral character of the lands might be investigated and determined, and, further, that if the lands were adjudged mineral, patent must be denied because mineral lands do not inure to the State under the swamp-land grant.

In the case of the State of Florida (47 L. D. 92), it was held (syllabus):

> The claim of a State to land under its swamp-land grant is incomplete and inchoate, and does not become perfect, as of the date of the act, until patent is issued conveying the fee simple title; and until so patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land as well as its mineral character.

Rehearing in that case was denied, the department stating that it found no reason for changing its views as expressed in the decision on appeal. (47 L. D. 93, 95.)

More recently, in the case of State of Louisiana (47 L. D. 366), it was held (syllabus) as follows:

> Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee-simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity.
>
> * * * * *
>
> Lands embraced within a petroleum withdrawal are thereby impressed with a *prima facie* mineral character; and the burden is upon the State to overcome this or suffer the rejection of its claim thereto under the swamp-

land grant, which does not embrace mineral lands.

In the course of that opinion it was said:

> The lands involved in the present appeal, as before stated, are within the limits of the petroleum withdrawal. They are thereby impressed with a *prima facie* mineral character. *Washburn* v. *Lane* (258 Fed. 524). This is so although one of the purposes of the withdrawal has been accomplished in the passage of the general leasing act of February 25, 1920 (Public, No. 146). Deposits of oil and gas are now subject to disposition only in the form and manner provided in that act. This department has no power or authority to pass title to oil and gas lands except in the manner prescribed by Congress. * * *
>
> The Commissioner of the General Land Office in the Ferry Lake case early expressed his opinion to the effect that mineral lands did not pass under the swamp-land grant. In the case of Sabine Islands, selected by the State as swamp, this department caused a careful field investigation to be made which resulted in a nonmineral report as to such lands before the selection list was approved. With all due deference to the expression contained in the opinion dated September 11, 1916, of the Acting Attorney General concerning Ferry Lake lands, this department, with which rests the jurisdiction and duty of determining in the first instance what lands are to be patented or approved under the swamp-land grant, is not pursuaded that lands mineral in character are included in such grant. The position taken in the department upon this question has been uniformly consistent since it first arose. The soundness of the argument and contention of counsel is not conceded. The State must bear the burden of making out a

case to overcome the *prima facie* mineral character of the land where the same is included in petroleum withdrawal or suffer the final rejection of its swamp-land claim.

The commissioner's action in ordering the hearing is sustained. The decisions called in question by the appeal are affirmed.

Directly referring to the lands in this township here involved, this department, in its instructions of September 2, 1919, in part, said:

> The department has held that mineral lands do not pass or inure to the State under its swamp-land grant. The claim of the State is incomplete and inchoate until the fee title is granted by either patent or certifications and the mineral character of claimed swamp land can be investigated and determined up to the time the legal title passes. See instructions of May 25, 1918 (46 L. D. 389). In the case of State of Florida (47 L. D. ———), decided upon appeal March 20 and upon rehearing May 14, 1919, a phosphate withdrawal was held to constitute a bar to the approval of the State's swamp selection. In instructions of April 26, 1915, unreported, the department concluded that there was such an intimate association and relation between oil and natural gas that lands withdrawn because of their oil deposits were also withdrawn for their gas content, and also that an oil withdrawal constituted a report that the lands were valuable for their deposits of natural gas. The reported production of gas in the southern portion of this township and upon neighboring lands amply demonstrates the wisdom of the existing withdrawal. Unless the State is prepared to and will show that its selected swamp lands within the withdrawn area are in fact nonoil and nongas in character its list after due notice must be rejected and

canceled. In this connection see the case of State of California *et al.* (41 L. D. 592), State of Wyoming (45 L. D. 590, 46 L. D. 34); *Buena Vista Land and Development Company* v. *Honolulu Consolidated Oil Company* (134 Pac. 1154), all involving State school selections intercepted by oil withdrawals.

This opinion might well rest at this point upon the reasons set forth and the authorities cited in the instructions and decisions above mentioned. The importance of the question involved, both to the State and to the Federal Government and the argument of counsel have, however, induced further investigation and consideration of the entire matter. This department is firmly convinced that the public policy of the Government, as expressed by Congress and gathered from the entire body of land legislation, has always been to reserve from sale, grant, or disposal, mines and mineral lands unless otherwise expressly directed by law.

> In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (Section 2318, Revised Statutes.)
>
> It has been the policy of the Government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States. (*United States* v. *Gratiot*, 1840, 14 Pet. 526–538.)
>
> Until 1866, no legislation was had looking to a sale of mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. (*Jennison* v. *Kirk*, 98 U. S. 453–458.)
>
> It could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States * * * we are forced to the conclusion that Congress

did not intend to depart from its uniform policy in this respect in the grant of those sections to the State. (*Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167–174.)

No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specifically authorizing the sale of such lands. (*Deffeback* v. *Hawke*, syllabus, 115 U. S. 392–404.)

While the early land laws occasionally and specially provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal; and this purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown in the Oregon donation act, the homestead act (which adopted the mineral land reservation of the preemption act of 1841), the grant to the several States for the benefit of agricultural colleges, the railroad land grants and other land acts of that period * * * these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and permanent in their nature. (*United States* v. *Sweet*, 245 U. S. 563, 568, 569.)

Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction

of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of February 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance was a recognition by the legislature of the State of the validity of the claim made by the Government of the United States to the mineral lands. (*Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634–641.)

In *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, this court decided that "the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1863, was not intended to cover mineral lands. Such lands were by the settled policy of the General Government excluded from all grants" at that time. (*Mulland & Another* v. *United States*, 118 U. S. 271–276.)

The act of May 17, 1856, making a grant of lands to the State of Florida to aid in the construction of railroad does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the Government to reserve such lands from grants to States or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant. (Florida Central and Peninsular R. R. Co., syllabus, 26 L. D. 600.)

That the swamp-land acts do not, of their own force, create a present grant of a complete title in the State is apparent from the authorities contained in

the instructions and decisions hereinbefore cited. As additional and supplemental to such citation, the following are in point:

> In *Heath* v. *Wallace*, 138 U. S. 573, 585, it was held that "the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department."
>
> * * * * *
>
> In the case of the *Central Pacific Railroad Company* v. *Valentine*, 11 Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uni-

formly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property." (*Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 328, 329.)

* * * no mere claim that they were swamp or overflowed lands could make them such, unless it was sustained by some decision or ruling by competent authority to that effect. * * * In determining this case it must not be overlooked that the act of Congress confers upon the Secretary of the Interior, and upon him alone, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850. Referring to the second section of that act, Mr. Justice Miller, speaking for the court in *French* v. *Fyan*, 93 U. S. 169, 171, said: "It was under the power conferred by this section that the patent was issued under which defendant holds the lands. We are of opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and *made his office the tribunal whose decision on that subject was to be controlling.*" To the same effect, on this point are *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68, and *Rogers' Locomotive Machine Works* v. *American Emigrant Co.*, 164 U. S. 559, 571. In the latter case the court said: "The identification of lands as lands embraced by the swamp-land act was therefore necessary before the State could claim a patent or exercise absolute control of them." (*United States* v. *Chic., Mil. & St. P. Ry.*, 218 U. S. 233, 240,

> This conclusive view is clearly pointed out in *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, *supra*, pages 196, 197. And that case also, page 196, completely answers the argument that although the land was not embraced in the selection, was not included in the township because unsurveyed, and did not pass by the patent or the selection independently considered, it yet must be treated as having passed to the State under the swamp-land act of 1850, because it was eligible to be selected under that act. (*Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31.)
>
> As to three of the tracts the swamp-land claim was examined and rejected by the department some time before this suit was begun, and as to the other two it was still pending. * * * The situation, then, at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers were specially charged by law with their examination and determination and with the disposal of the title accordingly. * * * Whether the tracts as to which the swamp-land claim is still pending were such as came within the terms of the swamp-land grant is a question of fact the decision of which is expressly committed to the Land Department. * * * (*Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 389, 392.)

That the department is not alone in its conclusions and interpretations with respect to the holdings of the Supreme Court of the United States regarding swamp land is indicated by the following decisions:

As soon as there has been legal selection of swamp and overflowed lands tantamount to indentification the State must be considered to have acquired the equitable title, which it can dispose of as it may deem advantageous or profitable. However, prior to the passing of the legal title by the issuance of a patent, the grant is said to remain in process of administration, and the Land Department of the General Government is not precluded from entertaining jurisdiction to determine in a proper case whether such equitable title has passed. * * * The action, therefore, of the governor in making the selection from legal subdivisions and actual surveys upon the ground, and the filing of his list in the local land office without the sanction, confirmation, or ratification of the Secretary of the Interior, was not an identification of such land as swamp and overflowed land.

Prior to identification there could be no title in the State to any segregated parcel of land. The general grant of swamp and overflowed lands entitled the State to the selection, and when made an equitable title would vest, to obtain, in course of administration, until yatent issued, when the legal title would become perfect. Prior to any selection the grant was in praesenti, it is said; but it is in the nature of a float, which attached to no particular parcel, and while the State might have contracted with reference to its anticipated title, it was vested with no specific interest in any particular tract that it was authorized or empowered to transfer or convey, because the United States had parted with nothing of the kind. The selection and identification was made an essential condition to the transfer or vesting of any specific title or other interest whatsoever; otherwise, the grant remained a float still, and was no one's land, but that of the

General Government, with obligations to make selections, and when made to convey the title by patent. The grant being in praesenti, it took precedence of other grants of public lands but vested no immediate title or interest in any particular parcel until identification, at which time, and not before, it attached definitely with relation back. The State therefore, prior to identification acquired no interest that it could convey. It could contract with relation to its swamp-land grant, perhaps, but it could convey no interest in any particular parcel. In this view, it is plain Miller acquired no vested or equitable interest in the land in dispute through his deed from the State, without previous selection and identification, that could avail him as against the General Government or its grantees. While the deed from the State might operate as a contract that would require the State to confirm its title to the purchaser when obtained, yet it did not convey any interest that the General Government was bound to take cognizance of or to protect, because not sanctioned by its authority. (*Kerns* v. *Lee*, 142 Fed. 985, 991, 992, 993.)

Under the act of Congress of September 28, 1850 (9 Stat. 519), granting to certain States swamp and overflowed lands and requiring the Secretary of the Interior to prepare and transmit an accurate list and plat of such land to the governor of each State, upon whose request a patent therefor should issue to the State, the legal title to such land remains in the Federal Government until such patent is issued; following *Warner Valley Stock Co.* v. *Smith*, 9 App. D. C. 187.

Where the Secretary of the Interior under that act prepares and transmits such a list and plat to the governor of one of the States named, the Secretary or his successor in office has the power at any time prior to the

issue of a patent to vacate and annul such list and plat. (Syllabus, *Brown* v. *Bliss*, 13 App. D. C. 279.)

* * * it must now be regarded as definitely settled by the later cases from the Supreme Court that, while concededly the act was by its terms a grant in praesenti, the legal title to the lands granted thereby vests in the State only upon definite identification of the lands to which it attached in the manner provided in the act, and that, until the ascertainment of that fact and the issuance of patent, the legal title remains in the Government, and that of the State is merely inchoate. (*Rogers' Locomotive Works* v. *Emigrant Co.*, 164 U. S. 568, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan Land, etc., Co.* v. *Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown* v. *Hitchcock*, 173 U. S. 476, 19 Sup. Ct. 485, 43 L. Ed. 772; *United States* v. *Chicago, etc., Ry. Co.*, 218 U. S. 242, 31 Sup Ct. 7, 54 L. Ed. 1015; *McCormick* v. *Hayes*, 159 U. S. 338, 16 Sup. Ct. 67, 40 L. Ed. 171; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. ——, decided January 26, 1914; *Sawyer* v. *Osterhaus*, 212 Fed. 765, 769.)

Counsel contends that the department, in its application and interpretation of the swamp-land grant undertakes to read into the statute a reservation of the mineral which Congress had not written therein. This suggestion is not well founded. The response might well be that the State is undertaking to read into the statute a provision expressly including therein all mineral lands. The authorities are clear, and the practice of this department has been uniformly to the effect, that unless minerals are expressly included by the grant they do not pass thereunder.

The contention of counsel to the effect that in any event the land must have been known to have been mineral in character at the date of the passage of the granting act, is not impressive. That argument is fully foreclosed by the principle found to be controlling in the case of *Barden* v. *Northern Pacific Railroad Company*, 154 U. S., 288, the conclusions reached by the department in the case of *Central Pacific Railroad Company* v. *Valentine*, 11 L. D. 238, and other like cases.

The views entertained by the department with respect to this matter will be followed until Congress expressly directs that mineral lands are and shall be included within the swamp-land grants or until the Supreme Court definitely decides that mineral lands do inure to the State under those acts. The well-established practice of refusing to certify or patent to the State under the swamp-land acts lands determined to be mineral in character is adhered to and governs this case. The decision appealed from is affirmed.

The single question presented and decided herein has been fully considered heretofore as well as in the pending case, and has always been adjudicated adversely to the contentions urged on behalf of the State. It is not perceived that any useful purpose would be subserved by allowing time for a formal motion for rehearing. This decision is declared to be final and conclusive and further proceedings will be in harmony with the views above expressed. The record is transmitted to the Commissioner of the General Land Office.

(Signed) E. C. FINNEY,
First Assistant Secretary.

○

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FILED

SEP 11 1928

WM. R. STANSBURY

Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] 6

HUBERT WORK, SECRETARY OF THE INTERIOR,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Court of Appeals of the District of Columbia.

PRINCIPAL BRIEF

For the State of Louisiana, Appellee.

PERCY SAINT,

Attorney General of Louisiana,

[redacted]

[redacted]

Attorneys for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 39

HUBERT WORK, SECRETARY OF THE INTERIOR,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

Appeal from the Court of Appeals of the District of Columbia.

ORIGINAL BRIEF

For the State of Louisiana, Appellee.

This case involves no question of fact and but one question of substantive law: *i. e.*, whether mineral lands are ex-

cepted from the swamp land grants to the State of Louisiana (9 Stat., 352, 519); and is here on appeal by the Secretary from the decision of the Court of Appeals affirming the decree of the Supreme Court of the District of Columbia enjoining him from requiring an inquiry into the mineral character of lands in Louisiana adjudged by the Department to be swamp within the purview of the grants.

The act of March 2, 1849 (9 Stat., 352) granted to the State of Louisiana "the whole of those swamp and overflowed lands therein, and which may be or are found unfit for cultivation." The statute required the Secretary of the Treasury (afterwards the Secretary of the Interior) to cause an examination to be made of all such lands by deputies of the Surveyor General, "and a list of the same to be made out and certified by the deputies and Surveyor General to the Secretary, who shall approve the same—and on that approval the fee simple of said lands shall vest in the State of Louisiana."

By act of September 28, 1850 (9 Stat., 519), a general grant of swamp and overflowed lands was made to all the states, with provision for selection by the states and issuance of patent as evidence of fee simple title. But the act of 1849 was not repealed by that of 1850.

Louisiana v. Garfield, 211 U. S., 70.

The record discloses that the township within which are located the tracts in controversy, was first surveyed

in the year 1838, and that these lands were returned as part of the beds of Cross Bayou and Cross and Sodo Lakes; but that by later survey made in 1871, the tracts here in question were returned as land, surveyed and subdivided as such. The record also shows that the State has sought on many occasions recognition of its title to these lands either by reason of their being part of the beds of navigable bodies of water at the date of the State's admission, or as passing to the State under its swamp land grants.

February 9, 1872, previous selection lists which had been made by the State were rejected on the ground that the lands selected "consist mainly of the beds of the former lakes." (Rec., p. 11.)

January 15, 1879, the Secretary of the Interior held, with respect to these and other lands, that the State's claim should be readjudicated under the rules applicable to the swamp grant. (Rec., p. 11.)

October 1, 1903 *(32 L. D., 270)*, the Secretary of the Interior, after a full review of the action by the State of Louisiana and of the Land Department, prescribed definite rules for the adjustment of the swamp land grants to the State of Louisiana, by which rules it was made the duty of the Commissioner of the General Land Office to approve or patent pending swamp selections according to the showing in the field notes of survey; and it was in further ad-

ministration of the grants, under these specific rules, that the Commissioner of the General Land Office, in decision of November 13, 1919 (Record, page 5), reached the conclusion (Record, p. 24) with respect to the lands involved in this suit:

> "It is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp and overflowed and, if nonmineral in character, inure to the State under its grant, and may be patented thereto when the record has been cleared of adverse claims."

The register of the local land office was accordingly directed to advise the State:

> 'That thirty days from notice will be allowed within which to apply for a hearing whereby it may be shown that these lands (those adjudged swamp under the Secretary's direction) are non-oil and non-gas in character. * * * In default of action hereunder by the State within the time limited its swamp land claim to the tracts immediately above described will be rejected and said lands will be held and treated as subject to disposition under the applicable public land laws." (Rec., p. 25.)

From this requirement that the State show, under penalty of forfeiture of its rights, that these adjudged swamp lands are, as a present fact, not valuable for oil or gas, the State took the case on appeal to the Secretary of the Interior, and that officer, with the whole record before him, affirmed the Commissioner's ruling; denying the State

even the ordinary right provided for in the rules of practice to apply for a rehearing. Motion for rehearing was, however, filed by the State, considered by the Secretary as an appeal to the supervisory power of the department, and overruled for the reason that "mineral lands do not inure to the State under the swamp grants," and that "the question of mineral character of lands is open to investigation and adjudication up to the time of issuance of final evidence of fee simple title." (Rec., p. 27.)

It thus is plain that the order that the State's claims be rejected and the land adversely disposed of unless the State apply for a hearing and therein prove the present non-mineral character of the lands, rests in its entirety upon the Secretary's conclusion of law that "mineral lands do not inure to the State" under the acts of 1849 and 1850.

The State of Louisiana thereupon brought this suit in the Supreme Court of the District of Columbia. The bill, after reciting the history of the case, avers that the Secretary is exceeding his power, authority and jurisdiction in the making of the unlawful and unauthorized requirement that the State apply for a hearing and therein assume the burden of showing that the lands found to be swamp and overflowed and so certified by official survey, have as a present fact no mineral value; and particularly in his order denying to the State the right to the lands if it does not undertake to assume and discharge the burden thus illegally exacted of it.

The State, therefore, prayed for an injunction, restraining the Secretary from enforcing the ruling complained of and requiring that such decision be vacated and that its rights under the swamp land grants be recognized and given full legal force and effect.

A motion to dismiss (Rec., p. 28) was overruled, and defendant declining to plead further, judgment was rendered by the Supreme Court according to the prayer of the bill commanding the defendant to vacate so much of the decision complained of as operates to withhold title from plaintiff for any reason dependent upon alleged mineral character, or requires a hearing where it may be shown that such lands are non-oil and non-gas, or otherwise non-mineral in character, and accordingly restraining the Secretary from making any disposition of said lands or from taking any action affecting the same, save such immediate steps as are necessary to the full and final recognition of the State's rights under the acts of March 2, 1849, and September 28, 1850, to the end that the evidence of title may be given to the plaintiff as by such acts required. (Rec., p. 30.)

This decree was affirmed by the Court of Appeals (Rec., p. 33), and the case is brought here by the defendant's further appeal.

ARGUMENT.

I.

The right of the State to maintain this form of action and to the relief here sought is settled by repeated decisions of this Court.

a.

The Nature of the Suit.

It is plain that no question is, or properly can be, raised in this case respecting the swampy character of the lands.

The administration of the public lands is undoubtedly under the jurisdiction and control of the Secretary of the Interior. Such jurisdiction includes, of course, the determination of all facts involved in the administration of the swamp land grants. The Secretary had here, after mature consideration, directed the Commissioner of the General Land Office to adjudicate the claim of the State according to the return made by the field notes of the government survey *(32 L. D., 270)*.

The Commissioner, acting under such instructions of the Secretary, proceeded to adjudicate the State's claim, and found and adjudged thereunder that the lands here involved were swamp, but withheld the evidence of title provided by the statute in such case because of his conclusions as matters of law:

(1) That mineral lands were excepted from the swamp land grant;

(2) That he had the right to exact of the State a negative showing, *i. e.*, that the lands adjudged by him to be swamp did not possess a present mineral value;

(3) That he might impose as a penalty for failure of the State to negative such present mineral value, a forfeiture of its swamp land claim.

Upon these conclusions of law the Commissioner ordered that unless the State should within thirty days apply for a hearing in which it would be held to prove affirmatively the present non-mineral character of the land, "its swamp land claim * * * will be rejected, and said lands will be held and treated as subject to disposition under the applicable public land laws." (Rec., p. 25.)

In its bill the State claimed that under the adjudication the swampy character of the lands was fully established, and that, therefore, the State's title was complete; the further exaction of showing that the lands are not mineral being contrary to law, and hence beyond the power of the Secretary of the Interior to impose. These facts, together with the affirmance of this order by the Secretary, are disclosed by the bill, the allegations of which are admitted by the appellant's election (Rec., p. 30) to stand on his motion to dismiss.

It is here and now urged that a formal list of the adjudged swamp lands was not made up, submitted to and formally approved by the Secretary of the Interior, and that, consequently, there was no adjudication of the swampy character of the lands by the Secretary, notwithstanding the adjudication was in accord with his direction and necessarily was before him on the State's appeal. But it must, of course, be conceded that the Secretary himself had proceeded to a final determination of the matter by his affirmance of the Commissioner's decision that the lands be approved to the State on condition that their present

non-mineral character be affirmatively proven, and that the State's claim should be canceled and adverse disposition made if the the State should not, within the delay therein fixed, assume and successfully discharge such burden.

b.

Sole Purpose of This Suit.

The sole purpose of this action is to relieve the State from the unreasonable, illegal and wholly arbitrary requirement that it prove, under penalty of loss of its rights, the non-mineral character of lands adjudged by the Department to be swamp under the purview of the statutes granting all lands of that character to the State. For it must be conceded that, if mineral lands be not excepted from these grants, the exaction of showing the non-mineral character of these lands is clearly unauthorized and arbitrary, and hence beyond the power of the executive.

c.

The Right to the Remedy Here Invoked.

In view of the property rights involved, the adjudication that the lands are swamp and the imposition, under penalty of concellation, of the requirement that the State affirmatively show the non-mineral character of the land, it is clear that the State has the right to test by means of a bill in equity the legal question whether such exaction is within the power of authority of the Secretary, and to an injunction if its position be well founded.

Such is the settled jurisprudence.

> "It is insisted by the learned counsel for the Government that the Court has no judisdiction to en-

tertain this suit, because the legal title has not yet passed from the Government, as no patent has passed. We have no disposition to question those cases in which the court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under acts of Congress intrusting such matters to that branch of the Government. * * * Since Marbury v. Madison, 1 Cranch, 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. * * * In our view, the case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. * * * There is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

Garfield v. United States, 211 U. S., 260.

"We have no doubt that the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. **If he had no power at all to do the act complained of he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law**

plainly requires him to do. As observed by Mr. Justice Bradley in Louisiana Board of Liquidation v. McComb, 92 U. S., 531 and 541:

" 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.' "

Noble v. Union River Logging Co., 147 U. S., 177.

"This suit is one to restrain the appellants from an illegal act under color of their office, which will cause a cloud upon the title of appellees. This disposes of the contention of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the Court 'wherein an essential party is not present in the forum and is not even suable—the United States.' "

See also:

234 U. S., 540, Lane v. Watts.

255 U. S., 228, Payne v. Cent. Pac. Ry. Co.

259 U. S., 197, Santa Fe Pac. R. R. v. Fall.

Louisiana v. Garfield, 211 U. S., 70, is in nowise opposed to this view.

In that case an injunction was sought to restrain the Secretary from carrying out an order directing the disposition of certain lands under an act passed by Congress in 1871, on the ground that the property had been approved to the State under the swamp land act of 1849, and that a later order of the Secretary, attempting to vacate such approval and directing other disposition of the lands, was void. The court held that the approval was absolutely void, and the order attacked valid, unless the State had acquired title by the statute limiting suits by the United States to vacate patents to five years.

> "The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of the act. But the doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard * * *. It might argue that, for equitable relief on the ground of the title in the plaintiff, in the teeth of the last-named act (of February 24, 1879, 16 Stat. 43) it would be necessary at least to allege that the State took and has held possession under the void grant. **The United States might, and undoubtedly would, deny the fact of such possession, and that fact cannot be tried behind its back.** It follows that the United States is a necessary party, and that we have no jurisdiction of this suit."

Manifestly, therefore, the decision in no way militates against the right of the State to enjoin the Secretary, in his administration of the Swamp Land Grant, from imposing upon the State an unauthorized condition based upon "a mistaken conception of his authority, and thereby casting a cloud upon the plaintiff's title."

Effort is made to bring this case within the ruling in *Louisiana v. Garfield* by the contention that the Secretary has not independently found as a fact that the lands are swamp. It is hardly necessary, however, to reply that, as was accepted by both courts below, the Commissioner's actions are the Secretary's, and that the finding by the Commissioner of the swampy character of the land, under the procedure prescribed by the Secretary and based upon the Secretary's instructions as to the conclusive probative character of the official field notes of survey, form the very basis upon which the Secretary has formulated his legal conclusions, and upon which he based the order here complained of. The decision that the land be approved to the State or disposed of adversely to the State, according to the State's election to put at issue and its ability to prove present nonmineral character, makes the finality of his ruling dependent entirely upon the correctness of his legal conclusion that mineral lands are excepted from the swamp land grant. This question of law, going to the power and authority of the Secretary, the State is entitled to bring into question in the manner here presented.

See *Payne v. Central Pacific Ry. Co., 255 U. S., 228,* where the identical relief was granted:

> "We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think that the suit is one to restrain the appellants from cancelling a valid selection through a mistaken conception of their authority, and thereby casting a cloud on the plaintiff's title."

See, also, *Santa Fe Pacific R. R. Co. v. Fall, 259 U. S., 197-8,* in which this Court said:

> "The Government argues that there was no jurisdiction over the bills because the question whether the lands selected were of the same quality as those relinquished rested wholly in the judgment of the Secretary. But the position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute when he took into account facts not known at the time of the selection, and we are of opinion that the company is entitled to bring that question into court."

For, if there be no exception of mineral lands from the grants, then the Secretary has overstepped the bounds of his authority, and has entered upon the domain of legislation.

d.

Nor is this suit affected by the fact that persons are seeking to make entries of part of the lands involved.

The lands here involved have been, as before shown, adjudged swamp and overflow lands, and were so returned by the field notes of the survey of the township in 1871.

Because of the long delay of the Land Department in the administration of the swamp land grants, numerous persons have been induced since the State's application to seek entry of these and similar lands, to which the right of the State has already attached.

Under the departmental decision in this case, these lands passed under the swamp grant if non-mineral in character, and it is proposed, on proof thereof, to certify or patent them to the State and to clear the record of such applications for entry.

But, despite the departmental order that the record be cleared of such applications on proof of non-mineral character of the lands, it is here argued that these applicants are necessary parties.

This court, however, in ***Lane v. Watts, 234 U. S., 538,*** has expressly held that they are not. There, as here by the two courts below, it was specifically decided that rights accrued under congressional grants were entitled to protection by injunction against the Secretary of the Interior, and that subsequent entrymen are not necessary parties. The report of the cited case shows (p. 537) the identical question raised by the Secretary and its adverse disposition (p. 540) upon the ground that "the suit is one to restrain the appellants from an illegal act under color of

their office, which will cast a cloud upon the title of appellees. This disposes of the contentions of appellants * * * that there is a defect of parties."

So here. The right of the State accrued, if at all, prior to the entries. If the lands go to the State, no rights have been initiated by the applications. If mineral lands, however, be excepted from the grant (and these lands be adjudicated mineral), then it is of no concern to the State whether such applications are accepted or not.

If the State's contention that the Secretary's imposition of proof that the lands are non-mineral is unwarranted be well founded, then such action on his part is a mere "illegal act under color of his office," which may be enjoined in a suit against him alone; and the State prevails or loses in such suit according to the correctness of the one question of substantive law so propounded.

The Secretary cannot sustain his own disregard of law by permitting applicants to enter lands wrongly denied to the State and thereby defeat recourse to the courts to correct his abuse of power.

It is, therefore, respectfully submitted that the Court has jurisdiction; that all necessary parties are before the Court, and that the suit is in no sense one against the United States, but merely to enjoin an official from imposing upon the grantee under an act of Congress an illegal and arbitrary exaction, and from cancelling the claim of

such grantee for failure to comply with such unlawful requirement.

See *Payne v. Central Pacific Ry. Co., 255 U. S., 228,* where the identical relief was granted:

> "We are asked to say that this is a suit against the United States, and, therefore, not maintainable without its consent; but we think that the suit is one to restrain the appellants from cancelling a valid selection through a mistaken conception of their authority, and thereby casting a cloud on plaintiff's title."

II.

ON THE MERITS.

In the decision of the Commissioner, affirmed by the Secretary, "it is found from the field notes of survey of 1871 that the lands hereafter described are swamp and overflowed" (Record, p. 22), from which it is concluded, as a matter of law, that the lands, "if non-mineral in character, inure to the State under its grant". Hence, the defendant holds not only that the lands in question are swamp and overflowed lands, but that the approved evidence that the lands are of such character has been part of the records of his office since 1871. Despite such finding, however, the Secretary refuses to approve the list of such swamp land, except upon the precedent condition that the State show affirmatively that the land is not now valuable for oil or gas.

But this, under the act of 1849, the Secretary was not at liberty to do. His judicial functions ceased with the de-

termination of the question of fact that the lands were swamp and overflowed under the purview of the congressional grants.

His further finding that the lands, if now mineral in character, do not inure to the State, is simply his conclusion of law, which, if incorrect, is but a wrong reason for refusal to perform a ministerial duty. This duty, of course, is that of approving the list of lands held to be swamp, by which approval the fee simple title is vested in the State, and for which approval no particular form of words is required by statute.

Louisiana v. Garfield, 211 U. S., 70.

That the swamp land acts of 1849 and 1850 were grants *in praesenti,* importing "an immediate transfer of interest, and not a promise of transfer in the future", is too well settled to admit of argument or discussion.

Railway Company v. Smith, 9 Wall., 95.
French v. Fyan, 93 U. S., 169.
Wright v. Roseberry, 121 U. S., 488.
Tubbs v. Wilhoit, 138 U. S., 134.

But it is urged in the brief for the Secretary that the State's title prior to approval is an imperfect or inchoate one, from which it is sought to be deduced that the State is, therefore, without right to sue.

Assuming the correctness of the premise, the conclusion is a *non sequitur.*

The acts of Congress making the grants are not meaningless. They certainly convey a present interest of some kind. They purport to be present grants. That they do, this court has often held. Their subject matter—that upon which they operate—is not lands to be defined by survey, but **all lands of a certain physical character** *i. e.*, all swamp and overflowed lands.

Conceding, therefore, that the title is imperfect—inchoate, if preferred—still the State has rights as grantee by the legislative department of the United States, which alone possesses the right to dispose of the public domain. These rights, the Secretary, as representative of another department, has no right to ignore and no power to disregard.

The statute provides for the issue of formal evidence of fee simple title (by approval under the act of 1849, by patent under that of 1850) on establishment of the swampy character of the land. The Secretary adds as his contribution by way of amendment under the guise of construction of the acts, a condition that the land, in addition to its swampy character, be not valuable for minerals.

The evidence of swampy character is required merely to identify the lands as part of the subject of the grant, and that this has been done here is admitted.

The State, as grantee, then, may, and properly does, object to the imposition of a further and unauthorized condition: an arbitrary and illegal impediment to the ripening

of its title into perfect ownership under the rights plainly vested by congressional enactment.

a.

The Swamp Land Act, constituting a present grant of all overflowed lands without restriction or reservation as to mineral lands, no such exception can now be written into the grant.

It will be noted that the terms of the swamp land grants to the State of Louisiana are plain and unambiguous, so that there exists no room for "the familiar rule of construction that where a statute operates as a grant of public property * * * and there is doubt as to the meaning of its terms * * * that construction should be adopted which will support the claim of the Government." True, it may be, however, that **prior** laws, so far as they indicate any fixed legislative policy with respect to the disposition of the public lands, are to be consulted, and that the swamp land grant to the State is to be read in the light of such fixed policy as may have previously existed, as evidenced by acts of Congress. But while, by prior legislation, salt springs, lead mines, and lands contiguous thereto, had been reserved from general disposition, the reservations were, since the acts of March 3, 1811 (2 Stat., 662, 665), in the interest of and for the benefit of the States. No such defined legislative policy existed with respect to the reservation of mineral lands prior to the passage of the swamp land grant to the State of Louisiana, as could by implication constitute a limitation upon the grant. This is made

clear on analysis of the several cases wherein it might be claimed that this Court has held that the general policy regarding reservation and disposition of mineral lands must be read as a part of the specific legislation under which rights are asserted to known mineral lands.

In *Morton v. Nebraska, 21 Wallace, 660,* lands were claimed under a military bounty warrant location, "so incrusted with salt as to resemble snow-covered lakes." As the policy of the Government, with respect to the reservation of **saline lands** had been fixed by specific legislation running back almost to the inauguration of our land system, it was held that the land there involved was not subject to location; but it will be noted that **the reservation of salt springs did not rest upon an implied reservation, but upon an express exception** in both acts of March 3, 1811, as well as in the act of July 22, 1854 (10 Stat., 338), and, further, that the exception was not in favor of the United States, **but of the State.** There is nothing in the *Morton* case from which it can be deduced that any policy of reserving **mineral lands,** or even of reserving mines from the **State,** existed at the time of the passage of the swamp land grants to the State of Louisiana.

In *Mining Company v. Consolidated Mining Company, 102 U. S., 167,* the lands involved were part of a Section 36 in the State of California, being one of the two sections in each township granted to the State in aid of the common schools. In the course of the opinion the court adverts to the fact that when the country was acquired by cession from

Mexico it was found to be rich in precious metals. To use the language of the court:

> "Such was the rapid influx of immigrants from eastern states that the California population at the time it was organized as a state, in 1850, was largely composed of mining camps and settlements engaged in mining these metals."

The school grant relied upon in that case is found in the act of March 3, 1853 (10 Stat., 244). The third section of this act provides:

> "That none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation."

From this language it necessarily followed that **there could be no sections** within mineral townships. The act further provided that if, upon survey, any portion of a Section 16 or 36 be found in possession of settlers, such land was also to be excepted from the grant. The township involved was not surveyed until March, 1870. In the statement of the case it was said:

> "That the patent of the United States was issued to defendant for three several mining claims, to-wit: The Spring Hill, the Geneva and the Keystone; that the Spring Hill was located in May, 1851; the Keystone in 1853, and the Geneva in October, 1863, and that the original locators of said claims and their grantees have held undisputed possession thereof ever since, and by such possession and the working of said mines the possessory title was vested in defendant at the time

> it filed its application for said patent in the Land Office of the United States at Sacramento, January 6, 1871, unless the State of California had acquired title to Section 36 by grant from the United States. It also appears that on the land thus claimed by plaintiff a mining town called Amador City exists, of about four to five hundred people, which began in 1850, and reached the number mentioned in 1855, with many dwellings and some forty acres cultivated by the owners of the Keystone mining claim."

It will thus be seen that **both exceptions in the granting act existed prior to the time the school section came into existence** by the running of the public survey. (See *U. S. v. Morrison, 240 U. S., 192.)* The point of the decision is merely that the court enforced specific exceptions in the granting act. On page 175 of the opinion it is said:

> "It follows from the finding of the court and the undisputed facts of the case that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant.
>
> "It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853."

United States v. Sweet, 245 U. S., 566, is the latest expression of this Court with regard to the policy of reserving mineral lands.

The case was a suit by the United States involving lands claimed by the State under the school land grant to

Utah (28 Stat. 107). The granting act was passed before the admission of Utah into the Union, and consequently, made to a state not yet in existence, could not have been a present grant. The opinion states that the land involved "is valuable for coal and has been known to be so since **before** Utah became a state." Thus the question for decision was whether a congressional act, which did not purport to operate *in praesenti*, conveyed lands known to be mineral at the time at which the grant should become effective; the act having been passed in 1894—**long after the policy of Congress with respect to the reservation and disposition of mineral lands upon the public domain had been fixed and formed into a special code collected in the Revised Statutes under the heading: "Mineral Lands and Mineral Resources."** The opinion points out that such legislative policy of excepting mineral lands first appeared in the statute dealing with grants to Nevada, and later in the act declaring that "no act passed at the first session of the 38th Congress granting lands to the States or corporations * * * shall be so construed as to embrace mineral lands." **Both these acts were passed long after the swamp act of 1849,** and consequently the comment of the court is not here applicable that:

> "Although applied in one instance to lands in Nevada, and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress, that every grant of public lands, whether to the state or otherwise, shall be taken as reserving and excluding mineral lands, in the absence of express

> purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and permanent in their nature—the first in enlarged terms as Section 2318, and the other as Section 2346."

Cooper v. Roberts, 18 Howard, 173, is directly in point and controlling here.

There, as in the California case *(102 U. S., 167)*, the defendant was in possession of mineral lands, operating the property under agreement with the United States **before the official survey.** As in the California case, the mine operator received a patent from the United States (reserving, however, the rights of the State). And, like the California granting act, the statute in controversy granted to the State of Michigan the sixteenth section in every township. Thus the facts are identical and the statutes, so far, the same. But, unlike the California act, **which prohibited the establishment of section lines in mineral townships,** and which excepted from its terms lands possessed by settlers, the Michigan act (like the swamp land acts) contained no exception except the necessary one as to lands previously sold or otherwise disposed of. No patent or other evidence of legal title had issued from the United States to the State, but the State had issued patent to plaintiff.

Answering the contentions that mineral lands did not pass to the State by the granting act, the court found no distinction could be made between mineral and other

lands; that there being nothing in the statutes to justify such difference, the court could read no exception of mineral lands into the plain grant of each sixteenth section.

Likewise, in the Swamp Land Acts, there could have been no thought of a tacit exception of mineral lands in the unambiguous grant to the State of "all" lands of the certain and definite physical character there described; nor at that date had the present policy of the Government with regard to mineral lands been inaugurated.

Deffeback v. Hawke, 115 U. S., 392.

Nor is there anything in the opinion in the *Sweet* case that in any manner detracts from the authority of *Cooper v. Roberts*, which the Department, in its letter of instructions (46 L. D., 393) intimates was there overruled. What this court said is this:

> "Some observations in the opinion are not in accord with our present conclusion. These were relied upon in Ivanhoe Mining Company v. Keystone Mining Company, 102 U. S., 167, as our records show, and were in effect disapproved; **besides, when they were made, the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were thereafter enacted and carried into the Revised Statutes;** the case is, therefore, neither controlling nor persuasive here."

But *Cooper v. Roberts* was decided in 1856, seven years after the passage of the swamp land grant of 1849, and six years after the passage of the grant of 1850.

At the date of the passage of the swamp land acts, therefore, "the public policy respecting mineral lands had not been expressed in general and permanent laws," and no reason can be adduced why, in the absence of an expression of Congress, an exception can now be read into an act granting in plain and unambiguous language all lands of a certain physical character.

Consequently, as was held by Solicitor General John W. Davis, as Acting Attorney General, in his decision of September 11, 1916 (Ferry Lake) advising the Secretary of the Interior with respect to the swamp land grant to Louisiana:

> "There was no exception of mineral land from the swamp land grant made to the State of Louisiana, and prior to that time, so far as Louisiana is concerned, the only reservation of minerals made by the Federal Government in its legislation affecting the public lands related to lands containing salt springs, lead mines and contiguous tracts. **The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana.** The act of 1849 was a present grant, operative, if at all, from its date. As this land was not known to be valuable for minerals at the date of the grant, I do not see how the subsequent discovery of minerals can in any wise affect the right of the State to acquire title. Nor would the situation be materially changed even if the mineral character of the lands had been known in 1849, because there was no exception of mineral lands in the swamp grant made to Louisiana."

A copy of this decision is printed as an appendix to this brief.

In appellant's brief but little more than one page is devoted to the merits of the case, and his principal reliance is upon *United States v. Gratiot, 14 Peters, 526.* That case was a suit upon a bond given to secure the United States in respect of the obligations of a lease executed by the Government of certain lead mines in Illinois; the lessee having mined a considerable amount of lead, the royalties upon which he refused to account and pay for. It was not denied that the property from which the lead was mined was the property of the Government. The sole defense was that the President had no power to execute leases within the Northwestern Territory, because, it was argued, the Virginia cession gave to the United States power only to "dispose of" the ceded lands, and not to hold and lease them. The sole question was whether power to **"dispose of"** lands empowered Congress to authorize their leasing, which was answered in the affirmative.

In the course of the opinion, in discussing the act under which the lease was made (p. 538), the court used the language quoted and relied upon in appellant's brief, that:

> "It has been the policy of the Government at all times, in disposing of the public lands, to reserve the **mines** for the use of the United States."

But it will be noted that the language of the court relates to **mines,** not mineral lands; and that the acts discussed are all of a date prior to that of March 3, 1811 (see *Morton v. Nebraska, 21 Wall., 660),* under which **the**

reservation of salt springs and lead mines was specifically made for the benefit of the States.

It is clear, then, that the only legislation of this character prior to the swamp land grants related to salt springs and lead mines and lands contiguous thereto; that there was then no such legislative policy with respect generally to "mineral lands," and especially, in view of the act of 1811, it cannot seriously be argued that there existed at the date of the grants any defined policy to withhold either mineral lands or mines **from the States.**

The only other case cited in appellant's brief on the merits is *United States v. Sweet, 245 U. S., 563,* which, as we have already seen, dealt with a grant *in futuro,* passed long subsequent to the expression by Congress of its policy with respect to mineral lands, and which was held by this Court not to apply to lands known to be mineral at the date the grant became operative.

It is apparent that the appellant appreciates the weakness of his position in attempting to engraft upon the plain language of the grants an exception of all mineral lands and seeks to defeat this suit upon matters of procedure.

b.

If an exception of mineral lands could be read into the swamp land grant to Louisiana the Department would have no right to refuse its approval to the State to lands which were not in 1849 KNOWN to be mineral.

It is unnecessary further to review the jurisprudence to the effect that the swamp land act of March 2, 1849, was a present grant, nor is it necessary to go into a discussion of the decisions holding that reference in any granting statute to **mineral lands** means **lands known to be valuable for minerals.**

Deffeback v. Hawke, 115 U. S., 392.
Davis v. Weibbold, 139 U. S., 507.
Shaw v. Kellogg, 170 U. S., 312.

From the nature of the grant and its description of the lands conveyed to the State according to their physical condition, "by which the act itself identified them" *(234 U. S., 685, Burke v. S. P. Ry. Co.)*, it must be held that if mineral lands were excluded from the grant such excluded lands would be those only which were **known** to be mineral on March 2, 1849; whereas the order enjoined required the State to show **present** non-mineral character.

c.

Even if mineral lands were excepted from the grant, inquiry as to the mineral character of these lands could not be required.

As shown by the record (page 24), it was found by the Department, and is a fact, that the field notes of the survey of 1871, made by Deputy Surveyor J. P. Parsons and approved by the Surveyor-General, show all of the tracts here involved to be of the character of the lands granted by the United States to the State in 1849.

It further is a fact, as shown by the record (page 14), that in 1901 these lands were selected by the State and approval requested.

Hence, the record shows, and it was so found by the Commissioner, that the records of the Department have disclosed since 1871, the swampy character of these lands, and that the official return by the Deputy Surveyor in that year identified all of such lands as swamp. In other words, the Surveyor-General furnished the Department, in 1871, with evidence that the lands here involved were lands granted in 1849 by the United States to the State. On the approval of this survey the lands were completely and officially identified, and on that date, therefore, it became the duty of the Secretary of the Interior to approve these lands formally to the State as swamp and overflowed lands.

As pointed out by the Court of Appeals (Rec., pp. 34, 35), *287 Fed. 1001:*

> "The Commissioner of the General Land Office, in a decision under date of November 13, 1919, addressed to the Register and Receiver of the Land Office at Baton Rouge, Louisiana, not only found from the field notes of the survey of 1871 that the lands were swamp and overflowed, but instructed the Register and Receiver that: 'The survey of 1871, having been duly made, approved and accepted, and being the latest and controlling survey of said Township 18 North, Range 14 West, will be followed in the future, as it has heretofore been in the past, in the adjudication of claims to public lands shown therein.' It, therefore, appears that the Deparmtent has, at all

> times, recognized the finality of the approval of the survey of 1871 as settling the character of the lands as swamp and overflowed."

Now, while under the act of 1849 it was not incumbent on the State to select or to request the issuance of evidence of the fee simple title, because the Department was charged under the act with the duty of investigating the character of the land and the obligation made mandatory on the Secretary to approve the list of such lands as might be certified to by his deputies, it does stand out in the record that in 1901 the State formally requested the issuance of evidence of fee simple title. (Record, p. 14.)

Under these facts, there could be no possible warrant in law for the present requirement by the Secretary that the State show that the lands are not now of a mineral character.

In 1871 the regularly deputized representatives of the Secretary of the Interior furnished that office with the authentic evidence identifying such lands, which previously had lacked only that identification required for the issuance of evidence of fee simple title. Thirty years later the State, acting upon such evidence requested the issuance of the certificate. In 1871 the identification required by the statute was complete; certainly in 1901 the State had done everything possible in its power to do to complete its title. No possible reason can be adduced for requiring evidence as to the condition of the land fifty years after its identification and twenty years after the request for a certification.

There are so many adjudications directly controlling here that we deem it necessary to refer only to a few recent decisions of this Court:

Wyoming v. United States, 255 U. S., 457:

"The Land Department uniformly has ruled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, **and not known to be mineral at the time identified by the survey, or at the date of the grant where the survey precedes it, regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery.** California v. Poley, 4 Copp's L. O., 18; Re Miner, 9 Land Decisions, 408; Rice v. California, 24 Land Dec., 14; United States v. Morrison, 240 U. S., 192-207, 60 L. Ed., 599-606, 36 Sup. Ct. Rep., 325; United States v. Sweet, 245 U. S., 563-572, 62 L. Ed., 473-480, 38 Sup. Ct. Rep., 193. And, as respects cash entries and entries under the preemption, homestead, desert land, and kindred laws, the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral, he acquires a vested right, which no subsequent discovery of mineral will divest or disturb. Harnish v. Wallace, 13 L. Dec., 108; Rea v. Stephenson, 16 L. Dec., 37; Reid v. Lavelle, 26 Land Dec., 100-102; Aspen Consol. Mining Co. v. Williams, 27 Land Dec., 1-17; Diamond Coal & Coke Co. v. United States, 233 U. S., 236-240, 58 L. Ed., 936-939, 34 Sup. Ct. Rep., 507. And this rule has been applied by that Department, although not uniformly, to

selections made in lieu of relinquished lands in public reservations. Thus in Kern Oil Co. v. Clarke, 30 Land Dec., 550, where a lieu selection under the act of June 5, 1897, Chap. 2, 30 Stat. at L., 36, 9 Fed. Stat. Anno., 2d Ed., 587, was under consideration, the Secretary of the Interior said, p. 556: 'When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the Government holds the legal title in trust for him; (2) that the right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it becomes fixed; (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.' "

Payne v. New Mexico, 255 U. S., 367:

"In the brief for the officers it is frankly and rightly conceded to be well settled that 'a claimant to public land, who has done all that is required under the law to perfect his claim acquires rights against the Government, and that his right to a legal title is to be determined as of that time'; and

> also that this rule 'is based upon the theory that, by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the Government holds it in trust for him.' See Lytle v. Arkansas, 9 How., 314, 333; Stark v. Starr, 6 Wall., 402, 417, 418; Ard v. Brandon, 156 U. S., 537, 543; Payne v. Cent. Pac. Ry. Co., 255 U. S., 228. But it is said that as the selection is 'subject to the approval of the Secretary of the Interior,' no right can become vested, nor equitable title be acquired thereunder unless and until his approval is had; and, therefore, that the rule just stated is not applicable here. To this we cannot assent."

And in the more recent case of ***Santa Fe Pacific Ry. Co. v. Fall, 259 U. S., 197:***

> **"It is established** in the parallel cases of Payne v. Central Pacific Ry. Co., 255 U. S., 228; Payne v. New Mexico, 255 U. S., 367, and Wyoming v. United States, 255 U. S., 489, 496, **that the validity of the selection must be determined according to the conditions existing at the time when it was made."**

It is, therefore, respectfully submitted that the decree of the Court of Appeals is correct, and should be affirmed.

Respectfully submitted,

PERCY SAINT,
Attorney General of Louisiana.
F. W. CLEMENTS,
S. L. HEROLD,
Attorneys for Appellee.

APPENDIX.

SWW-JEL

September 11, 1916.

The Secretary of the Interior:

Sir:

With your letter of March 22, 1916, you submitted to this Department the papers relating to the area known as Ferry Lake, in Township 20 North, Range 16 West, in the State of Louisiana, consisting of some 670 acres of land lying between the mean high water mark and the meander line established by the public land survey in 1839, and nearly 10,000 acres covered by the water of the lake itself.

This matter was first called to the attention of your Department in 1908 by the application of Thomas Singleton, Jr., and others for the survey of the resurveyed area of public land in the township named. Later, in the year 1910, John B. King and others filed amended applications under the mining laws of the United States, asserting an interest in portions of the area involved alleged to be valuable for oil and gas. From that time until the papers were submitted here last March, the matter has been pending before your Department in various forms. Investigations have been made by surveyors, geologists and ecologists of your Department. Several hearings have been had before the Commissioner of the General Land Office and the Secretary of the Interior, culminating in a lengthy communication to you from the Commissioner under date of July 9, 1915, in which the latter finds that the entire area

—that under the waters of the lake as well as the land between the high water mark and the old meander line—is the property of the United States and recommends its survey as such.

While you approve the facts found by the Commissioner, you conclude that there is no necessity for a survey at the present time, owing to the fact that all the vacant public lands in the township have been withdrawn from location, sale, etc., by the Departmental order of December 15, 1908, because containing valuable oil and gas deposits, and that the lands are now included in executive order of withdrawal dated July 2, 1910, as to the 670 acres of land lying between the old meander line and the mean high water mark, you state that wells have been drilled thereon in trespass and in defiance of the withdrawal orders and you accordingly recommend that appropriate proceedings be instituted to assert the right and claim of the Government to the lands, and the minerals therein, and also to recover for the trespass already committed.

As to the area below the mean high water mark of the lake, that is, the portion actually covered by water, upon which it seems more than sixty wells have been drilled under leases from the State or the Levee Board, which are producing large quantities of oil, you make no definite recommendation, further than to "submit the entire record to you (the Attorney General) for the institution of legal proceedings to assert and protect the interests of the United States in and to the land and minerals, if in your (the At-

torney General's) judgment the law and facts warrant such proceedings."

The papers in this case are voluminous, consisting of affidavits, briefs, reports and documents, some of which date back to the early days of the century. From such examination as this Department has been able to make of these papers, and from the facts stated by the Commissioner of the General Land Office in his lengthy report to you, and from the briefs of opposing counsel, as well as admissions made by them at a hearing which was held in this Department, I can safely say there is little, if any, real controversy over the material facts, which may be substantially stated as follows:

What is known as Ferry Lake, or Caddo Lake, as it is sometimes called, covers an area of some twenty by fifteen miles, lying partly in Louisiana and partly in Texas. In this area there are two bayous known as Cypress Bayou and James Bayou, the latter emptying into the former at a point now covered by the waters of the lake and the water carried by both bayous later found its way through Cypress Bayou into the Red River. A large part, if not all, of this area was low land, and at some time prior to the last part of the eighteenth century, *i. e.*, about 1780, was covered by a growth of forest trees. However, several hundred years ago there formed at the mouth of the Red River an accumulation of logs and debris which practically closed up the river and greatly impeded its flow. This accumulation was locally known as a raft, and while it existed it

continued to grow at its upper end by reason of the lodgment against it of other trees and matter flowing down the river, while the lower end, on the contrary, after a time began to decay and fall away so that the progress of the raft was up the current of the stream.

Some time about the year 1780, the particular date being immaterial, the raft had progressed up the stream to the point opposite Cypress Bayou. This impeded, if it did not stop, the flow of the water from the bayou into the river, as a result of which sediment was deposited in the bayou's mouth, and the waters were backed up until they extended beyond the banks and over the entire surrounding low area known as Ferry Lake. It should be said here that by reason of this deposit at the lower end of the bayou, its original course below the lake has been entirely obliterated and it no longer constitutes an outlet of Ferry Lake, which at some time formed another outlet higher up, known as Twelve-mile Bayou.

The raft continued in the river for many years, but has now been entirely removed. Indeed the removal took place a number of years ago, but upon the removal of the raft Ferry Lake did not disappear. In this connection it should be said that a few years ago the Federal Government constructed a concrete dam across the lower end of the lake so as to maintain a certain stage of water, and while the construction of the dam has maintained a higher level of water in the lake, it is not pretended that the lake would now be dry if the dam were removed, or if it had not been

constructed. The most that is contended in this regard is that when the hard soil in the bed of Twelve-mile Bayou is sufficently eaten away, which the applicants for survey predict will be within some 25 years, then the fall from Ferry Lake to Red River will be sufficent for Twelve-mile Bayou to drain the lake.

For many years, beginning possibly as early as 1840, there was considerable navigation across Ferry Lake from a point in Texas known as Jefferson. This navigation was through Ferry Lake and other lakes to the Red River, and thence down that river to the Mississippi and to various points along the latter. This commerce was at times by no means inconsiderable, but it has now diminished, principally on account of the construction of railways in that part of the country. The channel of Cypress Bayou can be distinctly traced even now through the bed of the lake. The trees that formerly grew on the land adjoining the bayou have been killed. Many of the stumps are still in existence, some of them projecting above the water, but many of them have entirely disappeared. The channel of the bayou is now susceptible of navigation, and has been so from a date prior to the establishment of the Government of the United States. That portion of the lake outside of the channel of the bayou varies in depth, some of it being nine or ten feet deep. Plats filed on behalf of the State of Louisiana show that a depth of three feet obtains over practically the entire area of the lake, a depth of five feet over a somewhat smaller area, and a depth of seven feet over a still smaller portion.

The meander line of the lake was surveyed in 1839, when the public lands surveys were extended over this section of the country, and from the examinations and surveys recently made by the General Land Office, that line did not accord with what was then the mean high-water mark of the lake. Notably on the north and near James Bayou a considerable area of what was land at that time, was omitted from the survey, and elsewhere there are slight variations between the survey of 1839 and the recent survey made by the General Land Office. However, on the whole, the recent careful investigations made by the agents of your Department show that with the exception of the land omitted on the north end of the lake the old survey of 1839 was remarkably accurate and practically followed, in the main, the mean high-water mark.

It is possible that the waters of Red River, in times of flood, now find their way into Ferry Lake, and it may be that some of them did so at the time of the formation of the lake, or soon afterwards, but Cypress Bayou has a water shed of some 2800 square miles, and its own waters are sufficient for the maintenance of the lake.

About the year 1908 the lands in this vicinity became known to be valuable for oil and gas. Exploration resulted in the discovery of wells of large production. The State of Louisiana, claiming to own the lands under the waters of the lake by virtue of its sovereignty, granted them to the Caddo Levee District, which, in turn, leased them to the Gulf Refining Company, the latter paying a royalty of one-

eighth of the mineral produced. Under this lease large sums of money have been paid into the treasury of the Levee District. The claim of the State of Louisiana is confined to the area actually covered by the waters of the lake, and it lays no claim to the 670 acres of land lying between the high-water mark and the old meander line.

It is claimed on behalf of the State of Louisiana that Ferry Lake as a whole is a navigable body of water; that it was such in 1812, when Louisiana was admitted into the Union on an equality with the other States, and that she thereby became entitled to the bed of the lake by virtue of her sovereignty; but if this contention should not prevail—that is, if the lake should be held to be non-navigable—in that event the State claims to be entitled to the lands lying under the water by virtue of the Swamp Land Grant made under the Act of March 2, 1849 (9 Stat., 352).

The applicants for survey, of course, base their claim under the mining laws of the United States, and they accordingly assert that the land is public land and urge that it be surveyed as such, to the end that they may be afforded an opportunity of perfecting their claims.

It is well settled that lands lying under navigable waters in this country belong to the States by virtue of their sovereignty. So numerous and well-known are the decisions on this point it is not necessary to mention them. The only question presented in this rgard is one of fact—whether the lake is navigable. That it was navigable at one time is

beyond dispute, and that portions are even now navigable is also true. This applies, at least, to what is known as the channels of Cypress and James Bayous. I do not think we are concerned with the cause from which the lake resulted. It may have been unusual, even extraordinary, but the admitted cause in this case was unquestionably not artificial.

It may be that about the time of the admission of Louisiana into the Union in 1812, the waters of the lake outside of the channel of the bayous were filled with stumps and bodies of dying or dead trees, which would have interfered with practicable navigation, and possibly have prevented it entirely. That, however, I regard as immaterial, because I have been referred to no decision to support the contention that there can be such a thing as the severance of the navigable from the non-navigable portion of a body of water. Certainly until now the United States has never questioned the navigability of this lake, nor has it done anything to show that it regarded the channel of Cypress Bayou as severable from the other waters of the lake. On the contrary, the entire area has been regarded as a lake, or body of water susceptible of navigation. When the public lands surveys were made nearly 75 years ago they represented the lake practically as it now is, with the exception heretofore noted, where on the north some considerable portion of high land was erroneously represented as water.

Until the land lying under the water was discovered to be valuable for oil and gas there was not even a sugges-

tion that Ferry Lake was not a permanent body of water susceptible of navigation, nor was any request made of the Government to extend its surveys across it, except in so far as certain comparatively small areas of land were concerned, which had been erroneously omitted from the original survey of 1839. This body of water as a whole furnished a channel for commerce and had done so for a number of years. On the face of it, therefore, the State was clearly justified in regarding the lake as a navigable body of water, and the Federal Government, by the construction of the dam across the lower end of the lake, has encouraged the State in this belief.

The channel of the bayou itself is unquestionably navigable, and the moment an attempt is made to regard the channel of the bayou as an independent navigable stream, entirely severable from the outlying water of the lake, another question is presented: If the waters may be properly severable, are not the submerged lands lying beyond the banks of the bayou overflowed lands and, therefore, subject to the grant made to the State of Louisiana in 1849 of all the swamp and overflowed lands "which may be or are found unfit for cultivation?"

It is beyond dispute that within the present boundaries of the lake and outside of the channels of Cypress Bayou and the other bayous flowing into it there was at one time, probably as late as 1780, a dense growth of forest timber, which proves conclusively that this area was at one time not covered by water. This area is styled by the

applicants for the survey as "submerged forest" or "submerged land," but it might as well be called "overflowed land." To my mind there is no difference.

It is contended by the applicants for survey that the water can be drained from this land. Indeed, they assert that if let alone the lake will drain itself in perhaps another 25 years. If that be so (and it must conceded that the land can be drained by artificial means, whatever may occur if it be let alone), the case would seem to be one peculiarly within the swamp land grant, which was made "to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein." It is not improbable that this very situation, and others like it, were in the mind of Congress when the swamp land grant was made. The case seems to fall within the very letter of the law, and I can conceive of nothing that would justify us in saying that it was not within its spirit.

I see little force in the contention that the State can not consistently now assert title under the swamp land grant. Its failure to do so earlier is accounted for by the fact that the lake was regarded as a navigable body of water. And it is idle to say that the State, having asserted a claim by virtue of its sovereignty, is now estopped to assert any other claim. If the officers of the State, misconceiving her rights, assert one claim, their action in so doing in no sense estops the State from subsequently asserting any rights she may have under the law.

As I see it, Ferry Lake is either a navigable body of water as a whole, or the area outside of the beds of the bayous must be regarded as submerged, or overflowed lands, which being susceptible of drainage, the State of Louisiana is entitled to acquire under the swamp land grant. I do not believe that in the State of Louisiana, where the swamp land grant obtains, the Government can properly close its surveys on a shallow, non-navigable body of water and thus prevent the State from acquiring title under the swamp and overflowed land grant. This is clearly indicated by the Supreme Court in its decision in *Mitchell v. Smale (140 U. S., 406)*, where, considering a somewhat similar question, the Court said:

> "Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done. (Pp. 413, 414.)

This brings me to a consideration of the last contention made by the applicants for survey, and in which they are sustained by the Commissioner of the General Land Office, namely, that the land in question is mineral, and, therefore, did not pass to the State under the swamp land grant. In this connection it is urged that such title as the State

acquired under that grant was merely inchoate, and that if prior to the perfection of that title by the performance of all the acts necessary to pass title, the land is discovered to be valuable for mineral, it is excepted from the grant. I do not understand this to be the law. **There was no exception of mineral land from the swamp land grant made to the State of Louisiana and prior to that time, so far as Louisiana is concerned, the only reservation of minerals made by the Federal Government in any of its legislation affecting the public lands related to lands containing salt springs, lead mines and contiguous tracts. The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana. The Act of 1849 was a present grant, operative, if at all, from its date, and as this land was not known to be valuable for mineral at the date of the grant I do not see how the subsequent discovery of mineral can in any way affect the right of the State to acquire title. Nor would the situation be materially changed, even if the mineral character of the land had been known in 1849, because there was no exception of mineral in the swamp grant made to Louisiana.**

This view is supported by the Supreme Court's decision in *Cooper v. Roberts (18 How., 173)*, which involved a question essentially similar. In that case the State's title under the school grant was contested upon the ground that the land was valuable for its deposit of copper and it was contended that by the act of March 1, 1847 (9 Stat., 146), all the reported mining lands in that district were removed

from the operation of the general laws. The land there involved had been reported as mining land and, indeed, it has been leased for mining purposes by the Secretary of War, large expenditures having been made under the lease.

The school grant involved in that case was like the swamp grant, one *in praesenti*, though unlike the latter, the former attaches to no particular tract of land until survey is made, notwithstanding which the Supreme Court held that as there had been no reservation of gold, silver or copper mines until after Michigan had been admitted into the Union, the act of 1847, which made such reservation, did not affect the State's right.

The decision in *Cooper v. Roberts* sheds further light upon this question in that it refers to subsequent legislation which abrogated those clauses of the act of 1847 which distinguished the mineral from other public lands and placed them alike under the ordinary system for the disposal of the public domain. (See the Act of September 26, 1850, 9 Stat., 472.)

In view of the entire situation I feel that no action should be taken to enforce or assert any claim by the Government to that portion of the area involved which is covered by the waters of the lake, because if the State's title by virtue of its sovereignty should fail for any reason I see no way of successfully resisting her claim under the swamp land grant.

However, in so far as concerns the land lying between the old meander line and the waters of the lake, I entirely agree with you that it constitutes unsurveyed public land of the United States, and that appropriate proceedings should be taken to enforce the Government's claims. I am so advising the United States Attorney at Shreveport by letter of even date and am sending him copies of the Special Agent's reports received with your letter of July 28 last, showing the trespasses which have been committed thereon.

In this connection permit me to say that I think it altogether advisable, if not in fact imperative, that the public land surveys be extended over the land before the suits which are to be brought are actually filed. While your Department has approved the finding of the Commissioner of the General Land Office that this land was erroneously omitted from the survey I still feel that the survey should be actually corrected before legal proceedings are instituted. The Courts have no power to make or correct surveys, and until the survey is corrected the Government might experience some difficulty in establishing its claim to the land. In this connection I invite your attention to the decisions of the Supreme Court of *Cragin v. Powell, 128 U. S., 691; Knight v. United States Land Association, 142 U. S., 161,* and *Kirwan v. Murphy, 189 U. S., 35.*

I have accordingly advised the United States Attorney that he should, as early as possible, prepare his pleadings, but that he should delay the filing of them pending the

execution of the survey, or at least until after one has been ordered and undertaken.

I am returning, under separate cover, all of the papers, maps, etc., received with your letter of March 22.

Very respectfully,

(Signed) JNO. W. DAVIS,
Acting Attorney General.